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DWI Law in Missouri

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DWI LAW IN MISSOURI

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I. INTRODUCTION

In view of the increasing public focus on drunk driving and the resulting pressure on law enforcement officers to remedy the problem, it is likely that many attorneys will come into contact with their state's DWI laws. This Comment is intended to give an overview of the intoxication-related state laws currently in effect in Missouri. In addition, some of the issues which have been raised in applying the statutes will be highlighted.

It should first be noted that an intoxication-related arrest may give rise to two separate proceedings.¹ A person may be subject to criminal or quasi-criminal prosecution for violation of a state statute or municipal ordinance. In addition, civil or administrative penalties may be imposed. The two proceedings are for the most part independent of each other; however, the issues involved in each often overlap.²

II. CRIMINAL TREATMENT OF INTOXICATION-RELATED OFFENSES.

A. Overview of the Statutes and Their Validity

The Missouri legislature has provided for two separate criminal offenses relating to the operation of a motor vehicle following the consumption of alcohol. First, section 577.010 provides that "[a] person commits the crime of 'driving while intoxicated' [DWI] if he operates a motor vehicle while in an intoxicated or drugged condition."³ "Intoxicated condition" is defined by statute as being "under the influence of alcohol, a controlled substance, or drug, or any combination thereof."⁴ Chemical analysis showing a blood-

1. See *Tolen v. Missouri Dep't of Revenue*, 564 S.W.2d 601, 602 (Mo. Ct. App. 1978).

2. *Id.*; see also *Strode v. McNeill*, 725 S.W.2d 30, 31 (Mo. Ct. App. 1986).

3. Mo. REV. STAT. § 577.010(1) (1986).

4. *Id.* § 577.001(2) (1986). It might be noted that there is no statutory requirement of an "impaired condition." The standard for "intoxication" is merely "under the influence of alcohol" or drugs. For further discussion, see *infra* notes 73-75 and accompanying text.

Police interview form sheets often contain the question, "Are you under the influence of an alcoholic beverage now?" Potential arrestees should be cautioned that an affirmative answer could be viewed as an admission on the issue of intoxication.

alcohol level of .10 percent or higher is considered prima facie evidence of intoxication at the time of the test.⁵

The second possible offense is outlined in section 577.012, entitled "Driving with excessive blood alcohol content" [BAC]. A person commits this crime if he "operates a motor vehicle in this state with ten-hundredths of one percent [.10 percent] or more by weight of alcohol in his blood."⁶ The prohibited percentage "may be shown by chemical analysis of the person's blood, breath, saliva, or urine."⁷

Although the two statutes appear to prohibit nearly identical conduct, the proof required for conviction and the consequences of conviction are not the same. In order to convict a person of a BAC offense, the State must show through an approved chemical test that the person had at least .10 percent alcohol in his blood at the time he was driving.⁸ Under the DWI statute, proof of intoxication does not require any specific blood-alcohol level, nor even that any chemical analysis have been performed.⁹ The State may instead choose to rely upon the opinion testimony of witnesses to prove that the accused was "intoxicated."¹⁰ Because of this evidentiary distinction, the courts have concluded that a BAC is not a lesser included offense of driving while intoxicated.¹¹

The penalties and consequences of a conviction under each of the statutes also differ considerably. A first offense DWI is a class B misdemeanor,¹² punishable by a fine not to exceed \$500¹³ and/or imprisonment for a term

5. *Id.* § 577.037(1) (1986). Under Mo. REV. STAT. § 564.442 (1969), a blood alcohol level of .15% or higher constituted prima facie evidence of intoxication.

6. Mo. REV. STAT. § 577.012(1) (1986).

7. *Id.* § 577.012(2).

8. *State v. Watts*, 601 S.W.2d 617, 619 (Mo. 1980); *see also State v. Bush*, 595 S.W.2d 386, 390 (Mo. Ct. App. 1980).

9. *Watts*, 601 S.W.2d at 619; *see also Bush*, 595 S.W.2d at 390.

10. *Bush*, 595 S.W.2d at 390; *State v. Walker*, 588 S.W.2d 726, 727-28 (Mo. Ct. App. 1979); *State v. Valerius*, 672 S.W.2d 726, 728 (Mo. Ct. App. 1984); *see also infra* notes 74-80 and accompanying text.

11. *E.g.*, *State v. Blumer*, 546 S.W.2d 790 (Mo. Ct. App. 1977). The test for determining "whether an offense is a lesser included offense of another is to compare the essential elements of both offenses." *Id.* at 791. If all of the elements of the "lesser offense" coincide with some of the elements of the more serious offense, the test is satisfied. Because a DWI does not require proof of a blood alcohol level of .10% or higher, a BAC is not a lesser included offense. *Id.* at 791-92. *See also Bush*, 595 S.W.2d at 390 ("The statutes lack the necessary common element required to make one a lesser included offense of the other."). One consequence of this conclusion is that a person charged with DWI is not entitled to a jury instruction on a BAC offense, which would have less severe penalties upon conviction.

12. Mo. REV. STAT. § 577.010(2) (1986). This section further provides that a person who pleads or is found guilty of DWI shall not be granted a suspended imposition of sentence unless they are placed on probation for at least two years.

13. *Id.* § 560.016(1)(2).

not to exceed six months.¹⁴ In addition, the Director of Revenue will assess eight points against the person's license.¹⁵ A driver who has accumulated eight points within an eighteen month period will have his license suspended for a period of thirty days, followed by a sixty day period with restricted driving privileges.¹⁶ A first BAC offense is a class C misdemeanor,¹⁷ for which a person may be fined up to \$300¹⁸ and/or imprisoned for not more than fifteen days.¹⁹ Six points will be assessed against the person's license following conviction.²⁰

The constitutionality of this statutory scheme was upheld in *State v. Watts*.²¹ The defendant in *Watts* argued that the DWI and BAC statutes prohibited the same conduct and therefore the disparity in potential punishments was constitutionally invalid. Based upon this premise, the defendant first argued that the later enactment of the BAC statute repealed the earlier DWI law by implication. The Missouri Supreme Court rejected this argument and reaffirmed that the two statutes "do not necessarily deal with the same conduct."²² The court found that the re-enactment of the DWI statute in the "new Criminal Code" indicated the absence of legislative intent to repeal the section, and the coexistence of the statutes was upheld.²³

The defendant in *Watts* also argued that because the statutes prohibited the same conduct, the coexistence of the statutes permitted excessive prosecutorial discretion in determining which charge to file. The defendant claimed

14. *Id.* § 558.011(1)(6).

15. *Id.* § 302.302(1)(7).

16. *Id.* §§ 302.304(2), (4). This is a special suspension period for points assessed following an intoxication-related conviction. These statutes further provide that a second DWI, or a first DWI following a prior conviction for a BAC, will result in 12 points against such person's license. *Id.* § 302.302(1)(8). A driver who has accumulated 12 points within a 12 month period will have his license revoked for 1 year; if such person does not file proof of financial responsibility in accordance with Chapter 303, the revocation period will be 2 years. *Id.* § 302.304(6). For further discussion of administrative penalties, see *infra* notes 296-325 and accompanying text.

17. Mo. REV. STAT. § 577.012(3) (1986).

18. *Id.* § 560.016(1)(3).

19. *Id.* § 558.011(1)(7).

20. *Id.* § 302.302(1)(9). This statute further provides that a second BAC or a first BAC following a prior conviction for DWI will result in 12 points being assessed against such person's license. *Id.* § 302.302(8). For further discussion, see *supra* note 16; *infra* notes 296-325 and accompanying text.

21. 601 S.W.2d 617 (Mo. 1980).

22. *Id.* at 619. The court supported this conclusion by pointing out that a conviction for DWI could occur despite the absence of the blood alcohol level required for a BAC. See *supra* note 11 and accompanying text.

23. *Watts*, 601 S.W.2d at 620. The court wrote that it "is not enough to show that the statutes produce differing results when applied to the same factual situation. Rather, the legislative intent to repeal must be manifest in the 'positive repugnancy between the provisions.'" *Id.* (quoting *United States v. Batchelder*, 442 U.S. 114, 122 (1979)).

that his due process and equal protection rights were implicated by the lack of clear statutory guidelines and the prosecutor's use of arbitrary and unreasonable criteria. The court also rejected this argument, noting that "[w]hether to prosecute and what charge to file . . . generally rest[s] in the prosecutor's discretion. . . . [W]hen an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."²⁴ The court held that the DWI and BAC statutes are of general application and operate equally upon the citizens of Missouri.

Case law establishing the proper criteria for prosecutors to consider in determining whether to charge an accused with DWI or a BAC is sparse. The statutes provide no further guidance than the minimum evidentiary requirements.²⁵ In *Watts*, the prosecutor stated that he had considered the defendant's driving record and his conduct at the time of arrest, and these were held to be permissible factors.²⁶ The Missouri Supreme Court stated that "[t]he prosecutor may be influenced by the penalties available upon conviction, but this fact standing alone does not give rise to a violation of the Equal Protection or Due Process Clauses. . . . The Equal Protection Clause prohibits selective enforcement 'based upon an unjustified standard such as race, religion or other arbitrary classification.'"²⁷

It appears, therefore, that so long as there is a chemical test showing a blood alcohol level of .10 percent or higher, the prosecutor has considerable discretion in determining which charge to file and prosecute. It is likely that this discretion is very useful in encouraging plea bargaining from defendants who prefer to opt for the less severe penalties of a BAC.

B. *Issues at Trial*

The elements which the State must prove in order to convict an accused are similar for both of the intoxication-related offenses. In either prosecution, the State must show that the defendant operated or had physical control over a motor vehicle.²⁸ For a DWI, there must be further proof that he was in an intoxicated or drugged condition while doing so.²⁹ In a BAC prosecution, the State need only present evidence that the defendant had a blood-

24. *Id.* (quoting *Batchelder*, 442 U.S. at 123); see also *State v. Jackson*, 643 S.W.2d 74, 77 (Mo. Ct. App. 1982).

25. See Mo. REV. STAT. §§ 577.010-.012 (1986); see also *infra* notes 28-30 and accompanying text.

26. *State v. Watts*, 601 S.W.2d 617, 621 (Mo. 1980).

27. *Id.* (quoting *Batchelder*, 442 U.S. at 123-25) (citation omitted).

28. Mo. REV. STAT. §§ 577.010-.012 (1986); see also *State v. Dodson*, 496 S.W.2d 272, 273 (Mo. Ct. App. 1973).

29. Mo. REV. STAT. § 577.010 (1986).

alcohol level of .10 percent or higher at the time he was driving.³⁰

1. Challenges to Whether the Defendant was Driving.

Because operation or control over a motor vehicle is an element of both DWI and BAC offenses, this may be an issue under either charge. Challenges can be grouped into two main categories: (a) the defendant may claim that he was not the person driving the vehicle, or (b) he may dispute the allegation that he was actually operating a vehicle at the relevant time.

a. Identity of the Person Driving.

If the defendant is observed in or around the driver's seat, a claim that someone else was driving is not likely to be successful.³¹ This is due largely to the rule that "[a]ny fact can be established by circumstantial evidence. . . . The circumstances must be such as are inconsistent with defendant's innocence, but it is not necessary that they be absolutely conclusive of his guilt."³²

If the defendant is not seen in the car, nor actually seen driving, the State may find it more difficult to prove that the defendant was the person driving. The defendant in *State v. Kennedy*³³ was found outside of his car in an intoxicated condition and was thereafter arrested by the police. There were no witnesses who could testify that they had seen the defendant either in the car or driving, or who knew how long he had been at the arrest location. The appellate court reversed his conviction for DWI because "there [was] nothing to indicate when, if ever, he operated the vehicle."³⁴

b. Definition of "Operating a Motor Vehicle"

A person may be convicted of an intoxication-related driving offense even if the vehicle was not actually observed in motion. These cases generally involve situations where the defendant was found in an intoxicated condition

30. *Id.* § 577.012.

31. *See, e.g., State v. Delaney*, 675 S.W.2d 105 (Mo. Ct. App. 1984). In *Delaney*, the defendant claimed that he was sharing a seat with his girlfriend who was driving. The police officer testified that while following the van he saw a person with a red sleeve in the driver's seat, and that upon stopping the vehicle, the defendant was the only person wearing red and was alone in the driver's seat. These facts were found sufficient to establish that the defendant was the person driving the vehicle. *Id.* at 106.

32. *Id.* (Citation omitted).

33. *State v. Kennedy*, 530 S.W.2d 479 (Mo. Ct. App. 1975).

34. *Id.* at 481. For a related discussion, see *infra* notes 67-72 and accompanying text.

in a parked car. In *Kansas City v. Troutner*,³⁵ the defendant was found asleep behind the wheel of his car; the vehicle was in park, but the motor was running. The state statute in effect at that time only prohibited the *operation* of a motor vehicle while intoxicated.³⁶ The defendant, however, was charged with violation of a municipal ordinance which prohibited both operating and being in actual physical control of a vehicle while in such condition.³⁷ The court rejected the defendant's argument that the ordinance was ambiguous and held that "actual physical control of a vehicle results, even though the machine merely stands motionless, so long as a person keeps the vehicle in restraint or in a position to regulate its movements."³⁸

In *State v. O'Toole*,³⁹ the defendant was found asleep behind the wheel of his automobile which was in park with the engine running and the lights on. The definition of "operating" in the state statute had been amended by this time to include "being in actual physical control of a motor vehicle."⁴⁰ In construing the current statute, the Missouri Supreme Court adopted the definition applied in *Troutner* and held that the defendant "was in a position to regulate the vehicle's movements and was therefore 'operating' the motor vehicle. . . ."⁴¹

More recent case law indicates that the engine of the vehicle must have been running in order to find that defendant operated the vehicle or was in "a position to regulate its movements."⁴² An unsuccessful attempt to start a car has been held not to constitute "operation" of the vehicle.⁴³ So long as the engine is running, however, a person will be deemed to be in actual physical control of the car, even if he is found sitting on the passenger side of the vehicle.⁴⁴

c. Admissions on Issue of Driving — The *Corpus Delicti* Rule.

In a criminal trial, an uncorroborated extrajudicial confession or admission may not be used as evidence of guilt unless the State establishes the

35. *City of Kansas City v. Troutner*, 544 S.W.2d 295 (Mo. Ct. App. 1976).

36. MO. REV. STAT. § 564.440 (1969).

37. KANSAS CITY, MO., ORDINANCE § 34.116 (1984).

38. *Troutner*, 544 S.W.2d at 300. It might also be noted that the defendant's car was parked in a private lot. Noting the proximity of the parking lot to the public streets, the court rejected the defendant's argument that Kansas City did not have the authority to extend the sanction to private property.

39. *State v. O'Toole*, 673 S.W.2d 25 (Mo. 1984) (en banc).

40. MO. REV. STAT. § 577.001(1) (Supp. 1982).

41. *O'Toole*, 673 S.W.2d at 27.

42. *State v. Liebhart*, 707 S.W.2d 427, 429-30 (Mo. Ct. App. 1986) ("a car which is not running cannot be restrained nor have its movements regulated"); cf. *State v. Hoeber*, 737 S.W.2d 484 (Mo. Ct. App. 1987).

43. *Liebhart*, 707 S.W.2d at 429-30.

44. *Taylor v. McNeill*, 714 S.W.2d 947, 948 (Mo. Ct. App. 1986). The court noted that "[w]hile he may not have been in the most convenient position relative to the car's operative controls, they remained within easy reach." *Id.*

essential elements of the *corpus delicti*.⁴⁵ The term *corpus delicti* means the "body of the crime."⁴⁶ Thus, in a DWI prosecution, the State is required to provide proof, independent of the confession, that (1) someone was operating the vehicle, and (2) that the person was in an intoxicated condition while doing so.⁴⁷

Most of the cases raising the *corpus delicti* issue involve situations where the defendant was not observed inside the vehicle or not seen actually driving.⁴⁸ If the State cannot establish the *corpus delicti*, an out of court admission by the defendant that he was driving will not be admissible.⁴⁹ However, this burden is not as difficult as it sounds.

The *corpus delicti* rule has been held not to require full proof of the body of the offense.⁵⁰ It is enough if there is independent evidence of circumstances which correspond to the circumstances related in the defendant's statement.⁵¹ In addition, the corroborating circumstances and the confession may be considered together in determining whether the *corpus delicti* was established.⁵² Finally, the State is not required to prove the defendant's connection with the crime he is charged with in order to establish the *corpus delicti*.⁵³

45. *E.g.*, State v. Johnson, 670 S.W.2d 552, 554 (Mo. Ct. App. 1984); Kansas City v. Verstraete, 481 S.W.2d 615, 616-17 (Mo. Ct. App. 1972). It should be noted that in civil or administrative proceedings, the *corpus delicti* rule does not apply; therefore, admissions or statements by the defendant are admissible. *See, e.g.*, Tuggle v. Director of Revenue, 727 S.W.2d 168, 169-70 (Mo. Ct. App. 1987); Tolen v. Missouri Dep't of Revenue, 564 S.W.2d 601, 602 (Mo. Ct. App. 1978).

46. W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 4 (1972). Some courts and commentators have stated that *corpus delicti* "consists of two elements: (1) proof, direct or circumstantial, that the specific loss or injury charged occurred, and (2) someone's criminality as the cause of the loss or injury." *E.g., id.*; Johnston, 670 S.W.2d at 554. The Johnston court noted, however, that "[t]hese principles . . . are not easily applied in prosecutions for offenses arising out of the operation of motor vehicles." *Id.*

47. *See, e.g.*, State v. Friesen, 725 S.W.2d 638, 640 (Mo. Ct. App. 1987); State v. Easley, 515 S.W.2d 600, 602 (Mo. Ct. App. 1974).

48. *E.g.*, State v. Cook, 711 S.W.2d 208 (Mo. Ct. App. 1986) (defendant changing tire); Johnston, 670 S.W.2d 552 (defendant inside car attempting to drive out of ditch); State v. Davison, 668 S.W.2d 252 (Mo. Ct. App. 1984) (defendant standing outside car which was stuck in a ditch); Verstraete, 481 S.W.2d 615 (defendant standing in a crowd, 50 to 75 feet away from his car).

49. *See Verstraete*, 481 S.W.2d at 617.

50. *E.g., id.*; Davison, 668 S.W.2d at 254.

51. *E.g.*, Cook, 711 S.W.2d at 209; State v. Whitely, 512 S.W.2d 840, 843 (Mo. Ct. App. 1974); Verstraete, 481 S.W.2d at 617.

52. *E.g.*, Verstraete, 481 S.W.2d at 617. In State v. Easley, 515 S.W.2d 600, 602 (Mo. Ct. App. 1984), the court pointed out that "[t]here is no hard and fast rule that evidence of the *corpus delicti* must precede the admission of defendant, so long as the essential elements of the crime are provided by the end of the trial."

53. State v. Johnston, 670 S.W.2d 552, 554 (Mo. Ct. App. 1984).

Circumstances which corroborate the defendant's admission may be shown by direct or circumstantial evidence. A review of the cases indicates that the courts are not particularly strict in this area. In *State v. Cook*⁵⁴ the defendant was changing a tire on the side of the road. A passerby stopped to help and later testified that there was a person in the passenger seat, and that the defendant got in and out of the driver's seat twice without adjusting the seat. This evidence was determined to be sufficient independent evidence to admit the defendant's statement that he had a blowout.⁵⁵ This was enough to establish that the defendant drove the vehicle. In *State v. Easley*,⁵⁶ the defendant was initially seen standing near his car which had been involved in an accident. Two witnesses testified that the defendant was at the scene, and that he accepted the keys from a person who had moved the car to the side of the road. This evidence sufficiently confirmed the defendant's statement that he had been driving so as to make the confession admissible.⁵⁷

The *corpus delicti* can also be established by circumstantial evidence. For example, in *State v. Johnston*,⁵⁸ the police observed the defendant trying to move his car out of a ditch. There were skid marks on the road and also some damage to a nearby fence. The court determined that there was sufficient independent evidence to establish that someone was driving the car, lost control and skidded off the road. The defendant's statement that he had lost control due to the wet pavement was sufficiently corroborated so as to be admissible.⁵⁹

One of the few cases in which the *corpus delicti* was held not to have been established is *Kansas City v. Verstraete*.⁶⁰ In that case, the police had been called to an accident scene. The defendant was initially seen in a nearby crowd of people. He told the police that he had been driving but stated that he did not think he had hit anything. Following a field sobriety test, the defendant was arrested for DWI. The court of appeals reversed his conviction on the grounds that the *corpus delicti* had not been sufficiently established

54. 711 S.W.2d 208 (Mo. Ct. App. 1986).

55. *Id.* at 209-10.

56. 515 S.W.2d 600 (Mo. Ct. App. 1974).

57. *Id.* at 602-03.

58. 670 S.W.2d 552 (Mo. Ct. App. 1984).

59. *Id.* at 555; *see also* *State v. Davison*, 668 S.W.2d 252, 254 (Mo. Ct. App. 1984) (independent evidence that the car had left the road; evidence sufficiently corroborated statement that driver had a blowout to be admissible).

60. 481 S.W.2d 615 (Mo. Ct. App. 1972); *see also* *State v. Friesen*, 725 S.W.2d 638 (Mo. Ct. App. 1987). In *Friesen*, defendant and friend were standing next to defendant's truck which was stuck in a ditch. A passing highway patrol officer stopped and later testified that defendant had stated "I overshot the driveway." *Id.* at 639. It was held that the *corpus delicti* had not been established and the conviction was reversed. The court stated, "The record before us establishes that Defendant was intoxicated but does not show either by direct or circumstantial evidence, that he or anyone else operated the truck while under the influence." *Id.* at 640.

to admit the defendant's extrajudicial statements.⁶¹ The court explained that "[i]ndependent of his admissions to the officer, there was *no* evidence from any source that prior to the time [the officer] observed appellant walking around on the sidewalk he was operating his motor vehicle. This is an essential element of the offense charged. . . ."⁶²

2. The *Dodson* Rule—Proof of Subsequent Intoxication.

A crucial element of the State's case in an intoxication-related prosecution is establishing not only that the defendant was intoxicated when arrested, but that he operated a motor vehicle *while in this condition*.⁶³ If there is an unaccounted for interval between the time that the defendant was driving and the time of arrest, this requirement may become an issue. The State may be called upon to refute the possibility that the defendant became intoxicated or consumed alcohol after he ceased driving.

State v. Dodson,⁶⁴ is perhaps the leading Missouri case holding that evidence of intoxication at a time subsequent to driving does not sustain the State's burden of proof. In *Dodson*, the defendant's car ran off the road at approximately 8:55 p.m.. Another person stopped to help and drove the defendant home. This witness later testified that the defendant did not appear to be intoxicated. At approximately 9:40 p.m., a highway patrol officer went to the defendant's home, found him in an intoxicated condition, and arrested him for DWI. The defendant testified at trial that after the accident he took "three big drinks of whiskey before lying down."⁶⁵ The court found that "[t]he fact that defendant was intoxicated at 9:40 p.m. is not substantial proof as to his condition approximately one hour previously."⁶⁶

In subsequent cases, a number of factors have been considered by the courts in determining whether *Dodson* is applicable. These factors include:

61. *Verstraete*, 481 S.W.2d at 617.

62. *Id.* The court reasoned that "[t]he circumstantial evidence that appellant's car was parked . . . against the curb 50 to 75 feet from where the officer first saw appellant does not support an inference that he was driving it prior to that time." *Id.*

63. *See State v. Dodson*, 496 S.W.2d 272, 273 (Mo. Ct. App. 1973).

64. 496 S.W.2d 272 (Mo. Ct. App. 1973).

65. *Id.* at 273. The police testified that the defendant initially told them that he had not been driving that night. At trial, he denied making such a statement. The court held that the State could not rely on the alleged extrajudicial statements. The court noted that the statements were not admissions, and pointed out that even if the jury disbelieved the defendant's testimony, such "disbelief does not permit an affirmative inference that all drinking which resulted in defendant's intoxication occurred prior to the accident." *Id.* at 275 (citing *State v. Taylor*, 422 S.W.2d 633, 638 (Mo. 1968)) (disbelief of testimony given by a defendant cannot be probative in favor of the State).

66. *Dodson*, 496 S.W.2d at 273.

1) whether the defendant was in or near the car at the time of arrest; 2) the amount of time elapsed from when the defendant was driving to the time of arrest; 3) whether the defendant was observed driving or immediately thereafter, and his condition at that time; 4) whether the defendant had access to intoxicants in the interval between driving and the arrest; and 5) whether the defendant admitted he was driving.⁶⁷

The *Dodson* rule is likely to become an issue in cases arising under the recently enacted statute permitting warrantless arrests for DWI suspects.⁶⁸ As a general rule, a warrantless arrest for a misdemeanor can only be made if the violation occurs in the presence of the arresting officer.⁶⁹ However, the

67. For subsequent cases following *Dodson*, see *State v. Liebhart*, 707 S.W.2d 427, 429 (Mo. Ct. App. 1986) (no evidence as to the interval between the accident and the officer's arrival at the scene, and no evidence of the absence of intoxicants at the scene to refute the possibility of intoxication during the interval); *State v. Kennedy*, 530 S.W.2d 479, 481 (Mo. Ct. App. 1975) (defendant outside car, unknown interval between driving and arrest, and no evidence that defendant ever drove the vehicle). It might be noted that in *Liebhart*, the court appears to suggest that the State is required to present at least some evidence refuting the possibility of intoxication during the interval between driving and arrest. *But cf.* *State v. Johnston*, 670 S.W.2d 552, 557 (Mo. Ct. App. 1984), where the court rejected the argument that the State should be required to present evidence precluding the possibility of subsequent intoxication.

For subsequent cases distinguishing *Dodson*, see *State v. Wolf*, 727 S.W.2d 477 (Mo. Ct. App. 1987) (50 minute interval between driving and arrest, and defendant had access to intoxicants; however, witness who arrived immediately after single car accident testified that defendant appeared intoxicated at the scene); *Kiso v. King*, 691 S.W.2d 374 (Mo. Ct. App. 1985) (short interval between driving and arrest; no evidence of intoxicants at the scene, admitted driving); *Johnston*, 670 S.W.2d 552 (Mo. Ct. App. 1984) (defendant found in his car; 28 minute interval between driving and arrest; no evidence of intoxicants at the scene; admitted driving); *City of Excelsior Springs v. Thurston*, 618 S.W.2d 49 (Mo. Ct. App. 1981) (seen driving erratically; short interval between driving and arrest; no intoxicants in the car); *State v. English*, 575 S.W.2d 761 (Mo. Ct. App. 1978) (approximately one hour between arrest and driving; observed drinking in interval; however, witnesses testified that defendant was driving erratically and was intoxicated at the accident scene); *State v. Hamaker*, 524 S.W.2d 176 (Mo. Ct. App. 1975) (witnesses testified defendant was intoxicated immediately after the accident); *State v. Bruns*, 522 S.W.2d 54 (Mo. Ct. App. 1975) (defendant in his car parked in driveway; attempting to start motor; 25 minute interval between time observed driving and his arrest); *State v. Milligan*, 516 S.W.2d 795 (Mo. Ct. App. 1974) (prior to accident observed driving erratically; 20 minute interval between driving and arrest; no credible access to intoxicants).

68. MO. REV. STAT. § 577.039 (1986); *see also* *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (discussion of fourth amendment principles and warrantless arrests for noncriminal traffic offenses).

69. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 56 (1972) ("[T]he prevailing view is that an officer may arrest under authority of an arrest warrant, without a warrant on reasonable grounds to believe that a felony has been committed by the person arrested, or without a warrant for any offense committed in his presence."). The authors noted, however, that the requirement of a warrant for out-of-presence misdemeanors has been changed by statute in some jurisdictions.

Missouri legislature has made an exception to this rule in section 577.039,⁷⁰ which permits police officers to arrest a person without a warrant if they have reasonable grounds to believe that the person has violated either the DWI or BAC laws. This authority exists whether or not the violation occurred in the officer's presence, so long as the arrest occurs within an hour and a half of the claimed violation.⁷¹ The application of this statute, however, will be tempered by the *Dodson* rule. The State will still be required to present substantial proof that the defendant was intoxicated *at the time* he was operating a motor vehicle.⁷²

3. Challenges to the Issue of Intoxication.

To convict a person of DWI, the State must present substantial evidence that the person was in fact in an "intoxicated condition." The statutory definition does not require any proof of an "impaired state," and merely provides that a "person is in an 'intoxicated condition' when he is under the influence of alcohol, a controlled substance, or drug or any combination thereof."⁷³ To establish that an accused was intoxicated, the State may present the testimony of witnesses regarding the defendant's behavior or condition, or the results of any chemical test showing blood-alcohol content.⁷⁴ As previously noted, chemical analysis is not required to prove that the defendant was intoxicated.⁷⁵

70. MO. REV. STAT. § 577.039 (1986).

71. *Id.*; see also *Collette v. Director of Revenue*, 717 S.W.2d 551 (Mo. Ct. App. 1986). In *Collette*, the court urged the legislature to reconsider the hour and a half time limit. The court stated that "[t]he statute places an investigating officer in an almost impossible position in the attempt to comply with § 577.039 which is prerequisite to the application of § 577.041 [revocation for refusal of chemical analysis]." *Id.* at 558. It would seem, however, that 90 minutes is hardly an "impossible" time limit for warrantless arrests of DWI suspects. In *Collette*, for example, the officer had a sufficient opportunity to arrest the appellant within the time allowed, but merely failed to do so. Because there was no valid arrest, the implied consent law was not triggered. For further discussion of *Collette*, see *infra* notes 129, 233. For further discussion of license revocation for refusal of chemical testing, see *infra* notes 224-62 and accompanying text. In *Strode v. McNeil*, 724 S.W.2d 245 (Mo. 1987) (en banc), the court held that the hour and a half time limit of § 577.039 does not apply to violations of county or municipal ordinances.

72. See, e.g., *State v. Dodson*, 496 S.W.2d 272, 273 (Mo. Ct. App. 1973).

73. MO. REV. STAT. § 577.001(2) (1986). It has been repeatedly held that juries do not need to be instructed on the definition of "intoxicated" because it is a "well-defined and well understood" term. See *State v. Johnson*, 625 S.W.2d 934, 936 (Mo. Ct. App. 1981). It would seem, however, that the term "intoxicated" is subject to a number of different meanings as to the degree required to make the condition a criminal offense.

74. E.g., *State v. Watts*, 601 S.W.2d 617, 619 (Mo. 1980).

75. E.g., *Watts*, 601 S.W.2d 617; *State v. Ruark*, 720 S.W.2d 453 (Mo. Ct.

a. Testimonial Evidence.

A witness need not be qualified as an "expert" in the area to testify as to his opinion whether the defendant was intoxicated. The general rule is that "[l]ay witnesses may give an opinion on the intoxication of another if preceded by evidence of conduct and appearance observed by them to support the opinion."⁷⁶ In addition, the witness must have "had a reasonable opportunity to observe the alleged offender."⁷⁷ When the witness is a police officer, the courts often note the number of years they have been so employed.⁷⁸ However, there does not appear to be any substantial requirement that the witness have any background or experience in recognizing an "intoxicated condition." For example, in *State v. English*,⁷⁹ the court determined that a fourteen year old passenger in a car hit by the defendant, who "had observed people on a few occasions of intoxication," was qualified to give his opinion that the defendant was intoxicated.⁸⁰

In addition to the testimony of witnesses, the trial court has discretion to admit videotaped evidence of the defendant's behavior while in the booking room.⁸¹ The tape would be made at or around the time of the breathalyzer test and thus would accurately show the defendant's conduct at the time that his blood alcohol level was tested. The foundational requirements for admission are satisfied if the officer testifies that the tape or copy is "an accurate and complete depiction of the events occurring."⁸² It would seem that the use of such evidence should be strongly encouraged. In intoxication cases, where the sufficiency of evidence often becomes a "swearing contest" between the accused and the police officer, an objective version of the accused's conduct would be highly instructive to the finder of fact.

At trial, the defendant may want to testify on his own behalf. He has a right to give his opinion as to whether he was intoxicated at the relevant

App. 1986); *State v. Valerius*, 672 S.W.2d 726 (Mo. Ct. App. 1984); *State v. Crawford*, 646 S.W.2d 841 (Mo. Ct. App. 1982); *State v. Walker*, 588 S.W.2d 726 (Mo. Ct. App. 1979); see also *infra* notes 104-08 and accompanying text (discussion of whether State is required to submit test results into evidence if the test was performed).

76. *State v. English*, 575 S.W.2d 761, 763 (Mo. Ct. App. 1978) ("The basis for admission of such an opinion should be such as to render the witness able to arrive at an intelligent opinion with respect to the subject matter." *Id.* (citing 32 C.J.S. *Evidence* § 546(4) (1964))); see also *Crawford*, 646 S.W.2d at 842-43.

77. *Walker*, 588 S.W.2d at 727.

78. *E.g.*, *State v. Palmer*, 606 S.W.2d 207, 208 (Mo. Ct. App. 1980) (15 years experience); *State v. Milligan*, 516 S.W.2d 795, 798 (Mo. Ct. App. 1974) (7 years experience); *State v. Persell*, 468 S.W.2d 719, 720 (Mo. Ct. App. 1971) (18 years experience).

79. 575 S.W.2d 761 (Mo. Ct. App. 1978).

80. *Id.* at 763.

81. *Rogers v. King*, 684 S.W.2d 390, 392 (Mo. Ct. App. 1984).

82. *Id.*; see also *State v. Molasky*, 655 S.W.2d 663, 668 (Mo. Ct. App. 1983).

time, and to present evidence of "the safe and careful operation of his motor vehicle. . . ."⁸³ The denial of this right has been held to be reversible error.⁸⁴ The defendant may, of course, also call other witnesses to testify in his defense.⁸⁵ A defendant's testimony regarding problems with and treatment of alcoholism, and testimony by his physician concerning such treatment has been held to be irrelevant to any issue in intoxication-related driving offenses.⁸⁶

b. Evidence of Refusal to Submit to Chemical Testing.

There is a split of authority among the states as to whether evidence of a defendant's refusal to submit to chemical analysis of his blood-alcohol level is admissible at his criminal trial.⁸⁷ Missouri has traditionally held that such evidence is not admissible.⁸⁸ However, the Missouri legislature recently revised section 577.041 to provide that evidence of refusal of chemical testing is admissible at a person's trial for DWI or a BAC.⁸⁹

83. *State v. Persell*, 468 S.W.2d 719, 721 (Mo. Ct. App. 1971). The court reasoned that "the manner of the defendant's driving of his motor vehicle, whether carefully or carelessly, is relevant to the issue of whether he was intoxicated." *Id.* (citing *State v. Ryan*, 275 S.W.2d 350 (Mo. 1955)); *see also State v. Ellsworth*, 468 S.W.2d 722, 723 (Mo. Ct. App. 1971).

84. *See Persell*, 468 S.W.2d at 721; *Ellsworth*, 468 S.W.2d at 723.

85. In *State v. Kimmel*, 720 S.W.2d 790 (Mo. Ct. App. 1986), the court held that the trial court's exclusion of the testimony of defendant's witness, who was a passenger in defendant's car at the time of arrest was "fundamentally unfair." The State did not show any prejudice which would result from the testimony.

86. *State v. Hampton*, 607 S.W.2d 225 (Mo. Ct. App. 1980). The trial court held that such evidence was pertinent only to the issue of punishment and excluded the testimony. The appellate court agreed with the exclusion, but held that "bibliographical information about the accused calculated to procure the jury's beneficence . . . is irrelevant . . . on any issue of the case, including punishment." *Id.* at 226 (citing *State v. Clemmons*, 460 S.W.2d 541, 545 (Mo. 1970)).

87. *See Annotation, Admissibility in Criminal Case of Evidence that Accused Refused to Submit to Scientific Test to Determine Amount of Alcohol in System*, 87 A.L.R.2d 370 (1963).

88. *See, e.g., City of St. Joseph v. Johnson*, 539 S.W.2d 784 (Mo. Ct. App. 1976). The court discussed at length the rationale for excluding "refusal evidence." The court first pointed out that Missouri "allows a motorist . . . 'the present, real option either to consent to the test or refuse it'. . . ." *Id.* at 786 (citation omitted). It was noted that Missouri accords arrested persons the right to consult with counsel prior to deciding whether to consent; such a right would not exist unless the suspect had a legal right to refuse. The *St. Joseph* court reasoned that "on principles of fundamental fairness . . . a defendant accorded a right by statute should not be required to explain the exercise of that right nor should it be used to create an inference of guilt." *Id.* at 787. At the time of the *St. Joseph* decision, the only statutory penalty for refusing chemical analysis was the possibility of license revocation.

89. MO. REV. STAT. § 577.041(1) (1986). The revised statute requires that police officers warn persons of the possible use of evidence of their refusal. *Id.*

The United States Supreme Court has addressed the constitutionality of statutes which permit the State to introduce evidence of refusal of chemical testing. In *South Dakota v. Neville*,⁹⁰ the Court held that the admission of such evidence in a defendant's criminal trial does not violate the privilege against self-incrimination. The Court initially pointed out that there is no constitutional right to refuse a lawful request to submit to chemical testing⁹¹; any such right a person may have is a matter of the state's legislative "grace." If the state chooses to give suspects a right to refuse testing, the statutory penalties of license revocation and the use of such evidence at trial is permissible.⁹² The Court went on to explain that "the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege."⁹³ The Court held that "a refusal to take a blood-alcohol test . . . is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination."⁹⁴

The *Neville* Court also upheld the use of refusal evidence against a due process challenge. Although the police officers had not warned the suspect that the evidence could be used against him at trial, the Court held that there was no "implicit promise to forego use of the evidence that would unfairly 'trick' respondent."⁹⁵

c. Sufficiency of Evidence.

Challenges to the sufficiency of opinion evidence regarding intoxication are generally unsuccessful, so long as the witness had a reasonable opportunity to observe the accused and testifies to conduct which supports the opinion.⁹⁶ The observed "symptoms" commonly recited by the courts as sufficient evidence include: bloodshot and/or watery eyes, flushed face, incoherent or slurred speech, "mussed" clothing, unsteady, stumbling, or staggering gait, an odor of alcohol on the person's breath, and poor results on

90. 459 U.S. 553 (1983).

91. *Id.* at 559-60 (citing *Schmerber v. California*, 384 U.S. 757 (1966)).

92. *Id.*

93. *Id.* at 562 (quoting *Fisher v. United States*, 425 U.S. 391, 397 (1976)).

94. *Id.* at 564. The Court noted that some courts have determined that refusal evidence is admissible under the fifth amendment on the grounds that it is a "physical act rather than a communication," or alternatively because it is "similar to other circumstantial evidence of consciousness of guilt." *Id.* at 560-61 (citations omitted). The *Neville* court declined to rest its decision on these grounds.

95. *Id.* at 566. As noted, under the revised MO. REV. STAT. § 577.041(1) (1986), officers must warn suspects that evidence of their refusal of chemical testing may be used against them.

96. See *supra* notes 76-80 and accompanying text.

the field sobriety tests.⁹⁷ The driving offenses which commonly seem to initiate the police contact include speeding, weaving, and involvement in an accident.⁹⁸ Of course, a defendant need not have exhibited all of these "symptoms," and convictions are based on any number of behavioral combinations.

In a DWI prosecution, the State is not required to present evidence of the defendant's blood-alcohol level. However, if such evidence is available, and if it indicates a blood alcohol level of .10 percent or higher, there is a statutory presumption that the defendant was intoxicated at the time of the test.⁹⁹ This obviously makes the State's case much easier to prove. If the chemical analysis indicates that the person's blood alcohol level was less than .10 percent, the statute provides that the charges "shall be dismissed with prejudice," unless the court determines that the case comes within one of three statutory exceptions.¹⁰⁰ A dismissal is unwarranted if:

- 1) [t]here is evidence that the chemical analysis is reliable . . . due to the lapses of time between the alleged violation and the obtaining of the specimen;
- 2) [t]here is evidence that the defendant was under the influence of a controlled substance, or drug, or a combination of either or both with or without alcohol; or

97. See, e.g., *State v. O'Toole*, 673 S.W.2d 25 (Mo. 1984) (en banc) (staggered, couldn't recite alphabet, odor of alcohol); *State v. Powers*, 690 S.W.2d 859 (Mo. Ct. App. 1985) (bloodshot eyes, flushed face, stumbling gait, odor of alcohol); *State v. Jackson*, 643 S.W.2d 74 (Mo. Ct. App. 1982) (bloodshot eyes, flushed face, unsteady walk, slurred speech, mussed clothes, odor of alcohol). But see *State v. Valerius*, 672 S.W.2d 726 (Mo. Ct. App. 1984). In *Valerius*, the defendant was seen weaving and skidded off the road. The police report indicated that defendant was confused, incoherent, stumbling, had the odor of alcohol and had a poor performance on the field sobriety tests. The breathalyzer test showed less than .01%. It was held that the evidence failed to rebut the statutory presumption of Mo. REV. STAT. § 577.037(1) (Supp. 1982) [since revised], that a person is presumed not to be intoxicated if the test results are lower than .05%. The court was apparently influenced by the fact that the police officer "never expressed an opinion on whether defendant was intoxicated." *Valerius*, 672 S.W.2d at 728; see *infra* note 103.

Field sobriety tests consist of various "exercises" which a police officer may ask a person to perform, such as reciting the alphabet, counting to ten or counting backwards, counting money, walking a straight line, balancing on one leg and touching the index finger to the tip of the nose with eyes closed. The implied consent statute, section 577.020, makes no reference to cooperation with such requests, and it would appear that a suspect is under no legal obligation to comply with the officer's "request."

98. See, e.g., *Powers*, 690 S.W.2d 859 (weaving); *State v. Schupp*, 677 S.W.2d 909 (Mo. Ct. App. 1984) (accident); *State v. Armistead*, 655 S.W.2d 852 (Mo. Ct. App. 1983) (speeding).

99. Mo. REV. STAT. § 577.037(1) (1986) provides: "If there was ten-hundredths of one percent or more by weight of alcohol in the person's blood, this shall be prima facie evidence that the person was intoxicated at the time the specimen was taken."

100. *Id.* § 577.037(5).

- 3) [t]here is substantial evidence of intoxication from physical observations of witnesses or admissions of the defendant.¹⁰¹

The statute thus makes it clear that a suspect cannot "pass" a blood alcohol test. Although the State is permitted to rely upon the validity of test results exceeding .10 percent (leading to a presumption of intoxication),¹⁰² the defendant cannot prove that he is *not* intoxicated by testing below .10 percent.¹⁰³ In such a case, the State can instead rely upon the subjective opinion of witnesses, which presumably initiated the arrest and chemical test in the first place.

If a defendant has submitted to chemical testing of his blood alcohol level, it appears that the State is not required to produce the results into evidence. Early case law, however, at least penalized such action by the State. For example, in *State v. Persell*,¹⁰⁴ the State failed to produce the results of a breathalyzer test which had been administered to the defendant following his arrest. The court wrote that "where one of the parties fails to produce evidence which is available to him and which he might be expected to produce, his failure to produce it authorizes a strong presumption that such evidence, if produced, would be adverse to him."¹⁰⁵ The continuing validity of this presumption, however, may be questionable in light of more recent case law.

In *State v. Crawford*,¹⁰⁶ the record indicated that a breathalyzer test had been administered to the defendant, but the results were not admitted at trial. The court noted that the record was "silent as to the reason."¹⁰⁷ The *Crawford* court made no reference to the *Persell* presumption, nor any negative inference, simply writing that "Missouri courts have never required the State to produce the results of chemical tests as a prerequisite to proof of intoxication."¹⁰⁸

101. *Id.*

102. *Id.* § 577.037(1).

103. This is because the State can look behind otherwise valid chemical test results and rely upon the opinion testimony of witnesses.

Prior to the 1983 amendment, Missouri law outlined three presumptions based upon blood alcohol levels: (1) if the person tested .05% or below, it was presumed that he was not intoxicated; (2) if the person tested above .05%, but lower than .10%, the test did not give rise to any presumption, but it could be considered with other competent evidence; (3) if the person tested .10% or higher, the test was *prima facie* evidence of intoxication. Mo. REV. STAT. § 577.037 (1978).

104. 468 S.W.2d 719 (1971).

105. *Id.* at 721; see also *State v. Ellsworth*, 468 S.W.2d 722, 724 (Mo. Ct. App. 1971).

106. 646 S.W.2d 841 (1982).

107. *Id.* at 842 n.2.

108. *Id.* The *Crawford* court relied upon two earlier cases in reaching its conclusion. The two cases, however, addressed significantly different factual situations. In *State v. Walker*, 588 S.W.2d 726 (Mo. Ct. App. 1979), no chemical test had been administered to the defendant; in *State v. Farmer*, 548 S.W.2d 202 (Mo. Ct. App.

C. *Breathalyzers and Chemical Tests.*

Proper chemical analysis results are a crucial element of the State's case with a BAC prosecution.¹⁰⁹ The issues herein are also relevant to DWI charges because the *prima facie* evidence rule will apply if the test indicates a blood alcohol level of .10 percent or higher.¹¹⁰ However, with a DWI prosecution, even if the defendant successfully challenges the chemical analysis results, the State may still rely upon testimonial evidence of his conduct.¹¹¹ In addition, chemical analysis issues may arise in connection with administrative proceedings and license revocations.¹¹²

1. Implied Consent Law.

Missouri statute section 577.020 provides that a person who drives "upon the public highways of this state shall be deemed to have given consent to . . . a chemical test or tests of his breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of his blood. . . ."¹¹³ The statute conditions this "consent" upon an arrest for "any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving . . . while in an intoxicated or drugged condition."¹¹⁴ In other words, for consent to be "implied," there must have been an arrest and probable cause to believe that the person was driving in an intoxicated condition.¹¹⁵

Implied consent laws have been justified on the basis that driving is a privilege rather than a right.¹¹⁶ The courts have reasoned that in exchange

1977), the test was apparently inaccurate. The courts therein simply held that the State was not required to *perform* or rely solely upon blood alcohol tests to prove an accused was intoxicated. The *Walker* and *Farmer* courts did *not* hold that the State can withhold evidence. See *California v. Trombetta*, 467 U.S. 479, 480 (1984) ("The Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment.").

109. Mo. REV. STAT. § 577.012(1) (1986) requires that chemical analysis of the defendant's blood show .10% or higher concentration of alcohol.

110. *Id.* § 577.037(1).

111. See *supra* notes 74-80 and accompanying text.

112. See *infra* notes 263-95 and 296-328 and accompanying text.

113. Mo. REV. STAT. § 577.020(1) (1986).

114. *Id.*

115. *State v. Copeland*, 680 S.W.2d 327, 331 (Mo. Ct. App. 1984). Probable cause to arrest a person for DWI "exists where a police officer observes a traffic violation or the unusual operation of a vehicle and upon stopping the motorist, indications of alcohol consumption are noted." *Cissell v. Director of Revenue*, 737 S.W.2d 522, 523 (Mo. Ct. App. 1987) (citing *Schranz v. Director of Revenue*, 708 S.W.2d 912, 913 (Mo. Ct. App. 1986)).

116. *Gooch v. Spradling*, 523 S.W.2d 861, 865 (Mo. Ct. App. 1975).

for their driver's licenses, motorists impliedly consent to a blood test in the event they are suspected of DWI.¹¹⁷

Several courts have referred to the term "implied consent law" as a "convenient misnomer."¹¹⁸ This is because motorists are granted by statute "the present real option either to consent to the test or refuse it."¹¹⁹ A police officer who has the requisite "reasonable grounds" to suspect a person of DWI may request that the person submit to a chemical test (or tests) of his blood.¹²⁰ The statute requires such a "request" to include the reasons for wanting the test, and it must also inform the person that refusal may result in revocation of his license and may be used as evidence against him at trial.¹²¹ Further, the statute expressly provides that if the motorist refuses the test, "then none shall be given."¹²² The motorist, therefore, is not bound by his implied consent and cannot be forced to submit to testing.¹²³

Assuming that probable cause exists, a police officer may lawfully request a suspect to submit to any two of the authorized tests.¹²⁴ A refusal of

117. *Id.*; see also *State v. Ikerman*, 698 S.W.2d 902, 906 (Mo. Ct. App. 1985). But see *City of St. Joseph v. Johnson*, 539 S.W.2d 784, 786 (Mo. Ct. App. 1976) (rejecting this theory). Perhaps a statement to this effect should be included on the backs of driver's licenses so that motorists could *know* what they have "impliedly consented to."

118. *Gooch*, 523 S.W.2d at 865; see also *St. Joseph*, 539 S.W.2d at 786 ("'implied consent law' both misnames [the statute] and also misleads as to its legal effect").

119. *St. Joseph*, 539 S.W.2d at 786; *Gooch*, 523 S.W.2d at 865; see also *Ikerman*, 698 S.W.2d at 906.

120. Mo. REV. STAT. § 577.020(1) (1986).

121. *Id.* § 577.041(1). For a discussion of license revocation for refusal of chemical testing, see *infra* notes 223-61 and accompanying text.

If the officer informs the suspect that the purpose of the test is to determine blood alcohol content, the "reasons for wanting the test" requirement is satisfied. *Corum v. McNeill*, 716 S.W.2d 915, 917 (Mo. Ct. App. 1986). The officer is not required to detail all of the facts and circumstances which gave rise to the suspicion that the person was driving while intoxicated. *In re Green*, 511 S.W.2d 129, 133-34 (Mo. Ct. App. 1974).

122. Mo. REV. STAT. § 577.041(1) (1986).

123. *E.g.*, *State v. Ikerman*, 698 S.W.2d 902, 906 (Mo. Ct. App. 1985) ("blood sample may be taken without a warrant . . . where the defendant is under arrest and has not negated his implied consent under § 577.020 by invoking his right of refusal under § 577.041"); see also *City of St. Joseph v. Johnson*, 539 S.W.2d 784, 786 (Mo. Ct. App. 1976); *Gooch v. Spradling*, 523 S.W.2d 861, 865 (Mo. Ct. App. 1975). But see *State v. Setter*, 721 S.W.2d 11, 16 (Mo. Ct. App. 1986), where the court indicated a suspect *can* be forced to submit to having a blood sample taken. It is unclear if the court intended to limit its holding to persons charged with involuntary manslaughter; however, this language is directly contrary to the express statutory right to refuse chemical testing under Mo. REV. STAT. § 577.041(1) (1986). In addition, the language is contrary to *Ikerman*, on which the *Setter* court purported to rely.

124. Mo. REV. STAT. § 577.020(2) (1986). The statute authorizes chemical analysis of a suspect's breath, blood, saliva or urine. *Id.* § 577.020(1).

either one may result in revocation of the person's driver's license.¹²⁵ In addition, the accused does not have a right to choose which of the statutory tests he will consent to.¹²⁶

If a person is incapable of expressly refusing the test, for example because of unconsciousness or death, his "consent" to testing is deemed *not* to have been withdrawn.¹²⁷ Police officers have the authority to direct medical personnel to withdraw blood for alcohol analysis, and these directions must be complied with unless the procedure would endanger the person's health.¹²⁸ However, it should be remembered that the person must have been arrested and there must have been reasonable grounds to believe that the person was driving in an intoxicated condition before his "consent" will be implied.¹²⁹

2. Validity and Admissibility of Breathalyzer Results.

The Missouri legislature has determined that chemical analysis test results are "valid" if the test was "performed according to methods approved by the state division of health by licensed medical personnel or by a person possessing a valid permit. . . ."¹³⁰ The rules regarding the approved equip-

125. *Id.* §§ 577.020(1), .020(2), .041(1); *see also infra* note 126.

126. *Kiso v. King*, 691 S.W.2d 374 (Mo. Ct. App. 1985). The court reasoned that:

If [such] a choice were allowed, a person could avoid taking a test by demanding one which he knew to be unavailable. The arrested person is protected from arbitrary action by the officer because the statute limits the number of tests which the officer can request to two.

Id. at 377.

127. Mo. REV. STAT. § 577.033 (1986).

128. *Id.* § 577.029. For a discussion of physician-patient privilege, *see infra* notes 146-49 and accompanying text.

129. Mo. REV. STAT. § 577.020(1) (1986); *State v. Copeland*, 680 S.W.2d 327, 330-31 (Mo. Ct. App. 1984). The court in *Collette v. Director of Revenue*, 717 S.W.2d 551, 558 (Mo. Ct. App. 1986), expressed frustration with the arrest requirement of the implied consent law. The court stated that "a driver might be in such poor physical condition that understanding of an arrest might not be possible." The validity of the arrest, however, does not rest on the accused's subjective understanding of being arrested. *See discussion in State v. Ikerman*, 698 S.W.2d 902, 905-06 (Mo. Ct. App. 1985).

130. Mo. REV. STAT. §§ 577.020(3), .026(1), .037(4) (1986). In the recent case of *State v. Peters*, 729 S.W.2d 243 (Mo. Ct. App. 1987), the results of a blood test were held to be inadmissible because the Department of Health had "failed to issue any regulations approving techniques, devices, equipment or methods for determining blood alcohol content from blood samples. . . ." *Id.* at 243. *See* 19 C.S.R. 20-30.070; *State v. Kummer*, 741 S.W.2d 285 (Mo. Ct. App. 1987) (test results from blood samples are admissible if the method was approved at the time the results are offered into evidence).

Recently, the courts have not been overly strict about the permit requirement. *See Elkins v. Director of Revenue*, 728 S.W.2d 567 (Mo. Ct. App. 1987), where the

ment and operating methods and the standards of competence for the persons administering the test have been set out in the Code of State Regulations.¹³¹ If there has been any significant deviation from the rules or procedures, it is possible that the results could be held invalid.¹³²

The foundational requirements for admission of breathalyzer results into evidence are based upon the statutory requirements for validity. The person administering the test must have been a qualified operator and must show that the Division of Health procedures were followed.¹³³ The courts are required to take judicial notice of the Division's rules,¹³⁴ and approved checklists may be admitted into evidence as a procedural matter to insure compliance with the rules.¹³⁵

A defendant's consent to chemical testing must have been voluntarily given in order for the results to be admissible at trial.¹³⁶ In *State v. Ikerman*,¹³⁷ the defendant had initially told the police that he did not want to take the test; after further discussion he eventually acquiesced. The court stated that "[o]nce the voluntariness is challenged, the state carries the burden of proving the voluntariness of the consent by a preponderance of the evidence."¹³⁸ It was held that the blood sample was taken in violation of section 577.041,

"only evidence of the officer's qualifications to operate such machine was the permit which became effective some eight months after the administration of Elkins's [sic] test." *Id.* at 568. The court nonetheless held that "[p]roduction of the permit itself at trial is not necessary . . . to prove one's qualifications in that possession of such permit is a matter within one's personal knowledge and testimony of such fact is adequate proof." *Id.*

131. Mo. CODE REGS. tit. 13, §§ 50-140.010-.060 (1984).

132. Although the courts consistently state that the division of health rules must be strictly followed, research has not yet disclosed a single case in which the court found a sufficient deviation to justify exclusion of the test results. In *State v. Jackson*, 643 S.W.2d 74 (Mo. Ct. App. 1982), the defendant presented evidence from the police report that the officer had not complied with the rule requiring 20 minutes of observation prior to the test. The court accepted the officer's explanation that the times had been incorrectly reported and admitted the evidence. *Id.* at 77-78.

133. *E.g.*, *Jannet v. King*, 687 S.W.2d 252, 254 (Mo. Ct. App. 1985); *State v. Johnson*, 687 S.W.2d 706, 709-10 (Mo. Ct. App. 1985); *City of Clinton v. Kammerich*, 642 S.W.2d 353, 356-57 (Mo. Ct. App. 1982).

134. Mo. REV. STAT. § 536.031(5) (1986); *Jannet*, 687 S.W.2d at 254-55; *Johnson*, 687 S.W.2d at 709.

135. *State v. Shephard*, 639 S.W.2d 258, 260 (Mo. Ct. App. 1982); *State v. Preston*, 585 S.W.2d 569, 571 (Mo. Ct. App. 1979).

136. *State v. Ikerman*, 698 S.W.2d 902 (Mo. Ct. App. 1985). However, the suspect may still be deemed to have consented to chemical testing pursuant to Mo. REV. STAT. § 577.033, if he fails to invoke his right to refuse under § 577.041. *But see State v. Setter*, 721 S.W.2d 11, 16 (Mo. Ct. App. 1986) (discussed *supra* note 123).

137. 698 S.W.2d 902 (Mo. Ct. App. 1985).

138. *Id.* at 907 (citing *State v. Rainboldt*, 676 S.W.2d 527, 528 (Mo. Ct. App. 1984)).

which provides that "[i]f a person under arrest refuses upon the request of the arresting officer to submit to a chemical test, . . . then none shall be given."¹³⁹

Missouri statute section 577.020(6) provides that "[u]pon request of the person who is tested, full information concerning the test shall be made available to him."¹⁴⁰ Initially, this statute was held to give the person discovery rights "to enable [him] to intelligently exercise his right to challenge the test's accuracy."¹⁴¹ Failure by the State to comply with a proper discovery request was held to bar the introduction of the test results into evidence.¹⁴² In the recent case of *State v. Clark*,¹⁴³ however, it was held that the statute does not provide a procedure for pre-trial discovery; the defendant must instead comply with the requirements of Missouri Supreme Court Rule 25.¹⁴⁴ The *Clark* court determined that section 577.020(6) now requires "that the officer administering the test . . . respond to questions regarding the test procedures."¹⁴⁵

A 1983 amendment to section 577.037 provides that the physician-patient privilege¹⁴⁶ will not prevent the introduction of otherwise admissible chemical analysis evidence.¹⁴⁷ Prior to this change, courts had held that defendants

139. *Id.* at 906-07.

140. MO. REV. STAT. §§ 577.020(6), .029 (1986).

141. *State v. Paul*, 437 S.W.2d 98, 101 (Mo. Ct. App. 1969); *see also State v. Blake*, 620 S.W.2d 359 (Mo. 1981) (en banc) (the court indicated that such discovery is also important to allow a potential challenge to the qualifications of the person giving the test).

142. *Paul*, 437 S.W.2d at 101-03.

143. 723 S.W.2d 17 (Mo. Ct. App. 1986).

144. *Id.* at 19-20 (rejecting the *Paul* court's interpretation of Mo. REV. STAT. § 577.020(6) (1986)). Failure by the State to comply with a proper discovery request under Mo. SUP. CT. R. 25 might still be sufficiently prejudicial to the defendant to require exclusion of the evidence. In *Blake*, 620 S.W.2d at 360-61, the Missouri Supreme Court held that the defendant was prejudiced by both the failure of the State to comply with discovery requests and by the late endorsement of witnesses and evidence. The court declined to decide whether disregarding "applicable discovery rules alone would mandate reversal." *Id.* at 361; *see also State v. Calvert*, 682 S.W.2d 474 (Mo. 1984) (en banc) (if defendant obtains a trial de novo, or hearing in a different court, an outstanding discovery request must be renewed).

145. *Clark*, 723 S.W.2d at 20 n.4. The court stated that such questions must be answered "[i]n order that the consent or refusal of the person to be tested be informed. . . ." *Id.* It is doubtful, however, that the court intended this to constitute an additional requirement for a valid consent or refusal of chemical testing.

146. MO. REV. STAT. § 491.060(5) (1986) provides that physicians are incompetent to testify "concerning any information . . . acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe . . . or do any act for him. . . ."

147. *Id.* § 577.037(1). It has also been held that the physician-patient privilege will not bar the introduction of statements made by a defendant to medical personnel that he had been drinking. In *State v. Schupp*, 677 S.W.2d 909 (Mo. Ct. App. 1984),

had a legitimate expectation of privacy in the contents of their blood.¹⁴⁸ If blood had been withdrawn from a person for medical purposes, the test results could not be used against such person in subsequent criminal proceedings.¹⁴⁹

There have not yet been any cases applying the new version of the statute.¹⁵⁰ However, it appears to be consistent with the intent behind another recent enactment. As previously noted, section 577.033 provides that "consent" to testing is deemed not to have been withdrawn if the person is incapable of expressly refusing the test.¹⁵¹ It may be presumed that in such situations, the test would be performed by medical personnel. If the physician-patient privilege could be raised to bar the introduction of test results, the "continuing consent" statute would not appear to be of much utility.

3. Malfunction of Breathalyzer Machines.

Breathalyzer machines are assumed to be functioning properly.¹⁵² Their reliability is said to be the basis for the value of the breathalyzer results.¹⁵³ The testing authority does not have a burden to affirmatively establish that the machine is working properly, unless there is evidence "at least suggesting malfunction."¹⁵⁴ "Suggestions" of malfunction generally arise where a later

the court found the privilege to be inapplicable because the statements were made in the presence of third parties, and because they were unrelated to the defendant's treatment. It would seem, however, that the presence/absence of alcohol in a patient's system would be at least potentially relevant to medical treatment. In addition, requiring a person in an emergency room to find a "private area" in which to discuss his condition seems slightly unrealistic.

Another recent enactment also pertains to the physician-patient relationship. Mo. REV. STAT. § 577.041(8) (1986) provides that "[n]otwithstanding any other provision of law or rule of confidentiality to the contrary, any physician licensed under Chapter 334, RSMo, who treats a person who appears intoxicated for injuries sustained in a motor vehicle accident, may immediately report same to a highway patrol officer or local law enforcement agency."

148. *State v. Copeland*, 680 S.W.2d 327, 329 (Mo. Ct. App. 1984).

149. *Id.* (citing *Conzenbach v. Ruddy*, 645 S.W.2d 27 (Mo. Ct. App. 1982)); *State ex rel. Mehle v. Harper*, 643 S.W.2d 643 (Mo. Ct. App. 1982).

150. The *Copeland* court decided the case under the "old statute" because the blood sample had been taken prior to the effective date of the 1983 amendment. The court declined to decide "[w]hether the expectation of privacy in blood or the results of tests on it has now been changed. . . ." *Copeland*, 680 S.W.2d at 329.

151. See *supra* notes 127-29 and accompanying text.

152. *State v. Powell*, 618 S.W.2d 47, 49 (Mo. Ct. App. 1981); *State v. Bush*, 595 S.W.2d 386, 389 (Mo. Ct. App. 1980).

153. *Powell*, 618 S.W.2d at 49; *Bush*, 595 S.W.2d at 389.

154. *State v. Powers*, 690 S.W.2d 859, 861 (Mo. Ct. App. 1985); see also *Jannett v. King*, 687 S.W.2d 252, 254 (Mo. Ct. App. 1985); *Bush*, 95 S.W.2d at 388-89.

inspection of the machine reveals that it is not working correctly.¹⁵⁵ Such evidence may shift the burden to the testing authority to show that the problem did not exist at the time of the defendant's test.¹⁵⁶ The State can meet this burden by showing that the malfunction was of a type or nature that would probably have been noticed by the person administering the test.¹⁵⁷ In addition, it has been held that if the malfunction would have affected the results in favor of the suspect, the admission of the evidence is not prejudicial.¹⁵⁸

4. Preservation of Breathalyzer Ampoules.

As previously noted, a person who submits to chemical analysis of his blood alcohol level has a statutory right to "full information concerning the test."¹⁵⁹ This right, however, does not include the right to inspect or re-test the ampoule used in the breathalyzer test.

In *State v. Preston*,¹⁶⁰ it was held that due process does not require the preservation of breathalyzer samples. Recognizing that suppression of evidence favorable to an accused is a violation of due process,¹⁶¹ the court reasoned that preservation of the ampoule would have produced neither exculpatory nor material evidence.¹⁶² The *Preston* court was satisfied that suspects' due process rights were sufficiently protected by their statutory right to have an independent blood test taken.¹⁶³

One problem with the *Preston* court's reasoning is that police officers are not required to inform arrestees of their right to seek independent testing. In the absence of such notice, and given the atmosphere of their arrest, it seems unlikely that most people would think of this method of protecting

155. See, e.g., *State v. Adams*, 689 S.W.2d 828 (Mo. Ct. App. 1985) (defect discovered when machine checked 53 days later).

156. *Jannett*, 687 S.W.2d at 254; *State v. Deimeke*, 500 S.W.2d 257 (Mo. Ct. App. 1973).

157. *Adams*, 689 S.W.2d at 830.

158. *Powers*, 690 S.W.2d at 861; *City of Cape Girardeau v. Geiser*, 598 S.W.2d 151, 152 (Mo. Ct. App. 1979).

159. MO. REV. STAT. §§ 577.020(6), .029 (1986).

160. 585 S.W.2d 569 (Mo. Ct. App. 1979).

161. *Id.* at 571 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

162. *Id.*

163. *Id.* at 571-72 (referring to the predecessor of § 577.020(5)). Part of the court's reluctance to require preservation of breathalyzer samples was based upon one line of scientific opinion which indicates that re-testing of ampoules is not feasible or reliable. *Id.* at 571 (in spite of expert witness testimony that measurable factors such as glass thickness and volume in ampoules could affect the test results); *State v. Bush*, 595 S.W.2d 386, 389 (Mo. Ct. App. 1980) (citing MOENSSSENS & INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES 93 (1978)).

their due process rights.¹⁶⁴ Nonetheless, several years after the *Preston* decision, the U.S. Supreme Court reached the same result in *California v. Trombetta*.¹⁶⁵

In *State v. Bush*,¹⁶⁶ the court indicated that a person could request that the breathalyzer sample be preserved, and that the police would then have a duty to protect the ampoule.¹⁶⁷ It appears, however, that the Division of Health rules which the court relied upon have been changed.¹⁶⁸ It is now unlikely that such a request would give rise to any duty to preserve the test ampoule.

D. Right to Counsel.

1. Prior to Testing.

The Missouri Supreme Court has held that there is no "constitutional right to consult with counsel prior to deciding whether or not to submit to a breathalyzer test."¹⁶⁹ The courts have recognized, however, that a right to consult with counsel is granted to arrestees by both state statute and the Rules of the Missouri Supreme Court.¹⁷⁰ Rule 37.89¹⁷¹ provides that a person who has been arrested without a warrant and held in custody has a right to consult with counsel "at all times." Similarly, Missouri statute section 544.170, the "twenty hour rule," gives a right to consult with counsel to anyone

164. See *California v. Trombetta*, 104 S. Ct. 2528, 2535 n.11 (1984) ("To the extent that this and other access to evidence cases turn on the underlying fairness of governmental procedures, it would be anomalous to permit the State to justify its actions by relying on procedural alternatives that were available, but unknown to the defendant.").

165. 467 U.S. 479 (1984).

166. 595 S.W.2d 386 (1980).

167. *Id.* at 389. The court referred to Mo. CODE REGS. tit. 13, § 50-140.040(3)(I), which apparently required the officer "to identify, label and protect, if applicable, any preserved sample." The court went on to state that "where it has already been determined that the sample is to be retained, as upon request by the arrestee, it is the duty of the law enforcement officer to serve as custodian of the prospective evidence." *Bush*, 595 S.W.2d at 389.

168. The current version of the Code does not contain the section relied upon by the *Bush* court. See *supra* note 167.

169. *Spradling v. Deimeke*, 528 S.W.2d 759 (Mo. 1975). The court reasoned that "[n]either the request to take a breathalyzer test nor the administration of the test involves interrogation of the arrested person. It simply calls for an affirmative or negative response, neither of which is incriminating in any respect." *Id.* at 764; see also Comment, *Right to Counsel Prior to Submission to Breathalyzer Test — The Impact of Missouri Supreme Court Rule 37.89*, 42 Mo. L. REV. 168 (1977).

170. E.g., *State v. Ikerman* 698 S.W.2d 902, 902 (Mo. Ct. App. 1985).

171. Mo. SUP. CT. R. 37.89; see also Mo. SUP. CT. R. 21.14.

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arrested for any "breach of the peace or other criminal offense."¹⁷²

Case law confirms that a suspect does have a right to consult with an attorney prior to deciding whether to consent to chemical analysis of his blood alcohol level.¹⁷³ However, this right does not extend to having an attorney present during the test,¹⁷⁴ unless the attorney is already at the test location.¹⁷⁵

2. Right to Have Counsel Appointed.

The sixth and fourteenth amendments prohibit an indigent defendant from being sentenced to imprisonment unless he has been afforded the opportunity to have counsel appointed on his behalf.¹⁷⁶ It is important to note that this right to counsel does not arise merely because imprisonment is an authorized penalty.¹⁷⁷ Rather, counsel must be appointed for an indigent defendant only if a term of imprisonment *will be* imposed if the defendant is found guilty.¹⁷⁸

A certainty of imprisonment upon conviction could arise either because the judge has determined before trial that it would be an appropriate sentence

172. MO. REV. STAT. § 544.170 (1986).

173. *E.g.*, *Spradling v. Deimeke*, 528 S.W.2d 759, 764-65 (Mo. 1975) (permitting a reasonable amount of time for the suspect to consult with an attorney or other person will not "undermine the purpose of [the DWI laws], nor affect the validity of the test results"); *see also Ikerman*, 698 S.W.2d at 907; *In re Purvis*, 591 S.W.2d 29, 30 (Mo. Ct. App. 1979); *Dain v. Spradling*, 534 S.W.2d 813 (Mo. Ct. App. 1976); *Gooch v. Spradling*, 523 S.W.2d 861, 866 (Mo. Ct. App. 1975).

In *Curry v. Goldberg*, 614 S.W.2d 318 (Mo. Ct. App. 1981), it is difficult to understand precisely what rights the accused was said to have. The court wrote that "[n]otwithstanding Curry's right as an arrested person to consult with counsel, which was honored by offering him the use of the telephone, he had no right to consult with counsel before deciding whether or not to submit to the breathalyzer test. . . ." *Id.* at 319 (citing *Deimeke*, 528 S.W.2d at 764). It seems likely that the latter part of the quote meant merely that the defendant did not have a *constitutional* right to counsel prior to making his decision. *See supra* notes 169-72 and accompanying text.

174. *E.g.*, *Deimeke*, 528 S.W.2d at 763 (consent to testing may be conditioned on attorney's presence).

175. *See, e.g.*, *Curry*, 614 S.W.2d at 319 (indicating that it might be unreasonable for an officer to refuse to defer testing if attorney is "due to arrive at the test site within a reasonable time"); *Deimeke*, 528 S.W.2d at 763 (if lawyer arrives before or during the test, suspect has a right to have attorney present).

176. *Trimble v. State*, 593 S.W.2d 542, 544-45 (Mo. 1980) (en banc) (citing *Scott v. Illinois*, 440 U.S. 367, 374 (1979)).

177. *Id.* at 544 (citing *Scott*, 440 U.S. at 374).

178. *See Dearing v. State*, 631 S.W.2d 328, 331 (Mo. 1982) (en banc). The court wrote that "even if Dearing had clearly shown indigency, there was, in the trial of that misdemeanor, no constitutional or legal requirement for appointment of counsel as no period of incarceration was imposed." *Id.*; *see also Trimble*, 593 S.W.2d at 544.

for the crime, or because it is mandated by statute.¹⁷⁹ For example, section 577.023(3) requires that a court impose a term of imprisonment for both "persistent" and "prior offenders."¹⁸⁰ Where imprisonment is a statutorily required sentence for an offense, an indigent defendant must be given the opportunity to have counsel appointed.

3. Effect of Uncounselled Convictions

The most common issue raised by an uncounselled conviction is whether it may be used to increase a defendant's sentence in a subsequent DWI or BAC prosecution. Section 577.023¹⁸¹ is the sentence enhancement statute for intoxication-related offenders; its purpose has been said to be to deter and "severely punish" repeat offenders.¹⁸²

In *Trimble v. State*,¹⁸³ the Missouri Supreme Court held that an uncounselled misdemeanor conviction is valid so long as no imprisonment was imposed. The court then reasoned that a conviction which was valid in terms of "its own penalty," could be used to enhance the punishment imposed in subsequent prosecutions.¹⁸⁴ In *Trimble*, the uncounselled conviction was used to enhance the offense charged to a third offense felony DWI.

Later the same year, the United States Supreme Court addressed the issue of uncounselled convictions and enhancement statutes. Its decision appears to have invalidated the holding of *Trimble*. In *Baldasar v. Illinois*,¹⁸⁵ the Court held that "it [is] plain that petitioner's prior uncounselled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction."¹⁸⁶ Uncounselled convictions were not declared invalid, nor were misdemeanor defendants granted a general right to counsel. *Baldasar* merely prevents such convictions from

179. See *infra* notes 180, 206-20 and accompanying text.

180. Mo. REV. STAT. § 577.023 (1986) is the sentence enhancement statute for intoxication-related traffic offenders. For further discussion of the enhancement statute and definitions of prior and persistent offenders, see *infra* notes 206-20 and accompanying text.

181. Mo. REV. STAT. § 577.023 (1986).

182. A.B. v. Frank, 657 S.W.2d 625, 628 (Mo. 1983) (en banc).

183. 593 S.W.2d 544 (Mo. 1980) (en banc) (relying on Scott v. Illinois, 440 U.S. 367 (1979), and Argersinger v. Hamlin, 407 U.S. 25 (1972)).

184. *Trimble*, 593 S.W.2d at 545. It should be noted that *Trimble* was decided before the enactment of § 577.023 (the sentence enhancement statute). The petitioner's convictions were under Mo. REV. STAT. § 564.440 (1978), which provided that "[a]ny person who violates the [statute] . . . shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, and a felony on conviction for the third or subsequent violation. . . ."

185. 446 U.S. 222 (1980).

186. *Id.* at 226 (Marshall, J., concurring); see also *State v. Wilson*, 684 S.W.2d 544, 545 (Mo. Ct. App. 1984) (citing *Baldasar*, 446 U.S. 222).

being "counted" for purposes of sentence enhancement in a later prosecution if imprisonment would be imposed upon conviction.¹⁸⁷ In *State v. Wilson*,¹⁸⁸ the Southern District held that "the principles of *Baldasar* . . . are applicable to driving offenses as defined in [the sentence enhancement statute]."¹⁸⁹

It should be noted that the 1982 version of the sentence enhancement statute has been changed. Section 577.023 used to make a distinction between counselled and uncounselled municipal/county violations.¹⁹⁰ Under the prior version, if the defendant had been represented by an attorney in the earlier proceeding, the conviction could be used in a later alcohol-related prosecution to enhance the punishment.¹⁹¹ If the defendant had not been represented, a plea or finding of guilty did not constitute a conviction for purposes of later sentence enhancement.¹⁹² The statute was changed in 1983, eliminating the counselled versus uncounselled distinction.¹⁹³ In *A.B. v. Frank*,¹⁹⁴ the Missouri Supreme Court interpreted the new statute to mean that convictions under municipal or county ordinances are not to be considered at all under the sentence enhancement statute.¹⁹⁵

187. The term "uncounselled conviction" as used here refers to situations where the defendant neither had nor waived counsel. If the record is silent, representation or waiver cannot be presumed. *State v. Wilson*, 684 S.W.2d 544, 546-47 (Mo. Ct. App. 1984) (citing *Burgett v. Texas*, 389 U.S. 109 (1967)). However, a court may properly look to "[c]opies from the record of proceedings of any court of record of this state," pursuant to Mo. REV. STAT. § 490.130 (1986).

Mo. REV. STAT. § 600.051(1) outlines the admonitions required for a valid waiver of counsel. See Mo. S. Ct. R. 31.02. In *Counts v. State*, 725 S.W.2d 891 (Mo. Ct. App. 1987), the following docket sheet entry was determined to be sufficient to show that defendant had waived counsel: "The court informs the defendant of the charges filed against him and of his right to consult with friends or counsel concerning same. The defendant declines further time or trial and enters a plea of guilty as charged." *Id.* at 892.

188. 684 S.W.2d 544 (Mo. Ct. App. 1984).

189. *Id.* at 546.

190. Mo. REV. STAT. § 577.023 (Supp. 1982).

191. *Id.* § 577.023(2). It might be noted that the conviction could be used to enhance a later sentence regardless of the disposition of the case.

192. *Id.*

193. Mo. REV. STAT. § 577.023(13) (1986). In *A.B. v. Frank*, 657 S.W.2d 625 (Mo. 1983) (en banc), the court recognized the potential chilling effect on a defendant's right to counsel because "a conviction following a counselled defense [would] be treated more prejudicially than would an uncounselled defense in a subsequent drunk driving proceeding." *Id.* at 627.

194. 657 S.W.2d 625 (Mo. 1983) (en banc).

195. *Id.* at 628-29. The court pointed out that the enhancement statute appears to focus on state law violations. In addition, the court noted what appeared to be an internal inconsistency in the statute. Section 577.023(13) provides that municipal and county violations are to be treated as prior convictions, but that they may not be used "to enhance a term of imprisonment in any subsequent proceeding." The *Frank* court determined that such convictions were not to be considered in determining "prior" or "persistent offender" status because the enhancement statute "provides

E. Sentencing

1. First Convictions

A first offense DWI is a class B misdemeanor.¹⁹⁶ It is punishable by a fine of up to \$500¹⁹⁷ and/or imprisonment for a term not to exceed six months.¹⁹⁸ If the court determines that a suspended imposition of sentence [SIS] would be appropriate, the person must be placed on supervised probation for a minimum of 2 years.¹⁹⁹ A first BAC offense is a class C misdemeanor.²⁰⁰ Upon conviction, a person may be fined up to \$300²⁰¹ and/or imprisoned for not more than 15 days.²⁰² The court also has the authority to order a person convicted of either a DWI or BAC to complete an alcohol or drug related traffic offender program [ARTOP].²⁰³ Participation in such a program may be a condition for suspending part of the sentence, or it may be ordered in addition to the other authorized penalties.²⁰⁴ The costs of the program must be paid by the person ordered to participate.²⁰⁵

2. Second or Subsequent Offenses

The Missouri Legislature has acted to increase the severity of the sanctions imposed upon repeat offenders. The sentence enhancement statute,²⁰⁶ enacted in 1982, evidences a strong policy favoring a term of imprisonment for prior and persistent offenders.²⁰⁷

only for imprisonment, not for a fine." *Frank*, 657 S.W.2d at 628; *see also* 83 Op. Att'y Gen. No. 132 (September 6, 1983).

An alternative interpretation would seem to be possible. In addition to the imprisonment provisions, the sentence enhancement statute also increases the "class" of the offense. Because of this, the authorized range of fines for repeat offenders is also increased. Municipal and county violations could be considered in subsequent prosecutions for the purpose of enhancing the fines imposed on repeat offenders.

196. Mo. Rev. Stat. § 577.010(2) (1986).

197. *Id.* § 560.016(1)(2).

198. *Id.* § 558.011(1)(6).

199. *Id.* § 577.010(2). It should be noted, however, that under § 577.023(13), an SIS is considered to be a conviction for purposes of the sentence enhancement statute. *See infra* note 218 and accompanying text.

200. Mo. Rev. Stat. § 577.012(3).

201. *Id.* § 560.016(1)(3).

202. *Id.* § 558.011(1)(7).

203. *Id.* § 577.049(1).

204. *Id.* Participation in an ARTOP program may only be used one time to suspend part or all of a sentence. *Id.*

205. *Id.* § 577.049(2).

206. *Id.* § 577.023.

207. *See id.* § 577.023(2), (3); *A.B. v. Frank*, 657 S.W.2d 625, 628 (Mo. 1983) (en banc).

A "prior offender" is a person who has pled or been found guilty of either a DWI or a BAC within five years of a previous intoxication-related conviction.²⁰⁸ The second conviction within a five year period is a class A misdemeanor,²⁰⁹ punishable by a fine of up to \$1,000²¹⁰ and/or a term of imprisonment not to exceed 1 year.²¹¹ The court is not permitted to "suspend the imposition of sentence . . . nor sentence such person to pay a fine in lieu of a term of imprisonment . . . nor shall such person be eligible for parole or probation until he has served a minimum of forty-eight hours consecutive imprisonment, unless . . . [he] performs . . . at least 40 hours of community service. . . ." ²¹²

The term "persistent offender" refers to a person who has pled or been found guilty of two or more intoxication-related offenses within the previous ten years.²¹³ The third or subsequent conviction within a 10 year period is a class D felony.²¹⁴ The defendant is subject to a fine of up to \$5,000²¹⁵ and/or a term of imprisonment not to exceed 5 years.²¹⁶ The court is not permitted to suspend sentence or permit payment of a fine in lieu of imprisonment.²¹⁷

It is important to note what constitutes a conviction for purposes of the sentence enhancement statute. The statute provides that a plea or finding of guilty, followed by a suspended imposition or execution of sentence is to be treated as a prior conviction.²¹⁸ Case law indicates that a prior conviction in which the defendant neither had nor waived counsel cannot be "counted" under the sentence enhancement statute if it would lead to the imposition of imprisonment.²¹⁹ It has also been held that municipal and county violations are not to be considered for purposes of the enhancement statute.²²⁰

208. *Id.* § 577.023(1)(3).

209. *Id.* § 577.023(2).

210. *Id.* § 560.016(1)(1).

211. *Id.* § 558.011(1)(5).

212. *Id.* § 577.023(2). The statute does not prohibit a court from suspending the execution of a sentence.

213. *Id.* § 577.023(1)(2).

214. *Id.* § 577.023(3).

215. *Id.* § 560.011(1)(1).

216. *Id.* § 558.011(1)(4).

217. *Id.* § 557.023(3).

218. *Id.* § 557.023(13); see *State v. Acton*, 665 S.W.2d 618 (Mo. 1984) (en banc) (upholding constitutionality of treating suspended imposition of sentence as a conviction for purposes of sentence enhancement statute); see also *State v. Lynch*, 679 S.W.2d 858 (Mo. 1984) (en banc). In *Lynch*, the court discussed the "Catch-22" nature of the use of a suspended imposition of sentence (SIS) for purposes of the sentence enhancement statute. The court noted that a defendant has no right to appeal an SIS despite the fact that an SIS "carries with it the stain of certain undesirable attributes of a conviction, such as use for enhancement of punishment." *Lynch*, 679 S.W.2d at 861.

219. See *supra* notes 183-89 and accompanying text.

220. *A.B. v. Frank*, 657 S.W.2d 625 (Mo. 1983) (en banc). For further discussion, see *supra* notes 190-95 and accompanying text.

II. ADMINISTRATIVE TREATMENT OF INTOXICATION OFFENSES.

As previously noted, administrative proceedings arising out of a DWI or BAC arrest are for the most part independent of any criminal charges which may result.²²¹ Even if the criminal charges are dropped or the defendant is acquitted, the State is not precluded from revoking a person's license for refusing to submit to chemical analysis,²²² or for a chemical test indicating a blood alcohol level of .13 percent or higher.²²³

A. License Revocation for Refusal of Chemical Testing.

Under Missouri's "implied consent law," a person arrested for a DWI or BAC has a statutory right to refuse chemical analysis of his blood alcohol level.²²⁴ The exercise of this right, however, is not without consequences. If the arresting officer has reasonable grounds to believe that the person was driving while in an intoxicated condition, he may submit a sworn report to the Director of Revenue that such person refused the requested test(s).²²⁵ The person's driver's license will then be revoked for a period of one year.²²⁶

Upon request, a post-revocation hearing is available.²²⁷ The issues at this hearing are limited to: (1) whether the person was arrested; (2) whether there

221. *E.g.*, *Strode v. McNeill*, 725 S.W.2d 30, 31 (Mo. Ct. App. 1986); *Askins v. James*, 642 S.W.2d 383, 385 (Mo. Ct. App. 1981); *Duncan v. Safety Responsibility Unit, Dep't of Revenue*, 550 S.W.2d 619, 622 (Mo. Ct. App. 1977). *But see infra* notes 296-325 and accompanying text (discussion of license suspensions and revocations based upon "points" assessed following convictions).

222. *Tolen v. Missouri Dep't of Revenue*, 564 S.W.2d 601, 602 (revocation pursuant to Mo. REV. STAT. § 577.041); *see infra* notes 224-62 and accompanying text.

223. Mo. REV. STAT. § 302.505(3) (1986) provides that "[t]he disposition of [the] criminal charges shall not affect any suspension under this section." *See Strode v. McNeill*, 725 S.W.2d 30, 31 (Mo. Ct. App. 1986) (revocation pursuant to Mo. REV. STAT. §§ 302.500-.540); *infra* notes 263-295 and accompanying text.

224. Mo. REV. STAT. §§ 577.020(1), .041(1) (1986); *see supra* notes 113-29 and accompanying text.

225. Mo. REV. STAT. § 577.041(1) (1986); *see also Senn v. Director of Revenue*, 674 S.W.2d 43 (Mo. Ct. App. 1984) ("arresting officer" need not be the one who originally apprehended the suspect); *Walker v. Goldberg*, 588 S.W.2d 83 (Mo. Ct. App. 1979) (affidavit not void despite fact that notary was not present when signed).

226. Mo. REV. STAT. § 577.041(1) (1986). In addition, under the revised version of this statute, evidence of the refusal may be introduced at the person's criminal trial.

227. *Id.* § 577.041(2). The constitutionality of the summary suspension procedures was upheld in *Blydenburg v. David*, 418 S.W.2d 284 (Mo. 1967) (en banc). The court reasoned that driving was a privilege, not a right; therefore, revocation of a driver's license "without notice or a hearing does not deprive the licensee of his property without due process of law, so long as the licensee is given the right of appeal or review of the suspension or revocation." *Id.* at 290.

were reasonable grounds to believe the person was driving in an intoxicated condition; and (3) whether the person refused to submit to the requested test(s).²²⁸ The State has the burden of proof on all three issues and must present its evidence first.²²⁹ Because it is a civil proceeding, the *corpus delicti* rule²³⁰ does not apply. Therefore, extrajudicial statements or admissions by the licensee may be admitted to aid the State's case.²³¹

At the hearing, the state must first establish that the person had been placed under arrest.²³² This is because an "arrest" is necessary for the implied consent law to arise.²³³ Disputes are likely to center on the second and third issues: specifically, whether there were reasonable grounds to believe that the person was driving while intoxicated, and whether the person refused a proper request to submit to chemical testing. The second issue raises many of the same questions discussed in the previous section on criminal treatment of intoxication offenses. The State must show that the officer reasonably believed that the defendant was the person driving the vehicle,²³⁴ that he was intoxicated,²³⁵ and further, that he drove while in this condition.²³⁶

228. MO. REV. STAT. § 577.041(2) (1986); see also *Askins v. James*, 642 S.W.2d 383, 385 (Mo. Ct. App. 1981).

229. E.g., *Postlewait v. Missouri Dep't of Revenue*, 643 S.W.2d 314, 316 (Mo. Ct. App. 1982) (driving privileges ordered reinstated because State failed to present any evidence on "the disputed requirement of refusal to take the test"); *Askins*, 642 S.W.2d at 385 ("if there is a negative finding of any one of the three requirements, the revocation cannot stand").

230. See *supra* notes 45-62 and accompanying text.

231. *Tolen v. Missouri Dep't of Revenue*, 564 S.W.2d 601, 602 (Mo. Ct. App. 1978) (due to the civil nature of the proceedings, the standard of proof required is only preponderance of the evidence); see also *Tuggle v. Director of Revenue*, 727 S.W.2d 168, 169-70 (Mo. Ct. App. 1987); *Montesano v. James*, 655 S.W.2d 137, 139 (Mo. Ct. App. 1983).

232. MO. REV. STAT. § 577.041(2)(1) (1986).

233. *Id.* § 577.020(1); see also *supra* notes 113-15 and accompanying text. In *Collette v. Director of Revenue*, 717 S.W.2d 551 (Mo. Ct. App. 1986), the court ordered that the petitioner's license be reinstated because there had not been a lawful arrest. The court stated that "[a] refusal [of chemical testing] without a prior arrest does not meet the requirements of [§ 577.041]." *Id.* at 557.

The *Collette* court expressed some frustration with the requirement of an arrest to trigger the implied consent law. The court was concerned that law enforcement officers would be hampered in situations where a suspect would be "in such poor condition that understanding of an arrest might not be possible." *Id.* at 558. The legislature addressed this problem, however, in MO. REV. STAT. § 577.033 (1986), which provides that a person is deemed to consent if he is incapable of refusing a blood alcohol test. In addition, it does not appear that a person must subjectively understand he is under arrest in order to have a valid arrest. For a thorough discussion of arrest requirements, see *State v. Ikerman*, 698 S.W.2d 902, 904-06 (Mo. Ct. App. 1985). For further discussion of *Collette*, see *supra* note 71.

234. See *supra* notes 31-34 and accompanying text.

235. See *supra* notes 73-86 and accompanying text.

236. See *supra* notes 35-44, 63-67 and accompanying text.

Case law indicates that the most litigated issue at post-suspension hearings is whether the person “refused” to submit to chemical testing. To begin with, there must have been a proper request made by the police officer.²³⁷ Such request must include the officer’s reasons for asking the person to submit to the test,²³⁸ and additionally must inform the suspect that his license may be revoked if he refuses.²³⁹ Under the new version of section 577.041, the officer must also tell the person that evidence of his refusal may be used against him at trial.²⁴⁰ No particular words are required to be recited in order to constitute a proper request or warning.²⁴¹ It might also be noted that the officer is *not* required to warn the suspect of the possible consequences of *submitting* to chemical testing.²⁴²

“Refusal” has been defined as the “volitional failure to do what is necessary in order that the test can be performed. . . .”²⁴³ For example,

237. MO. REV. STAT. § 577.041 (1986); *see In re Purvis*, 591 S.W.2d 29, 30 (Mo. Ct. App. 1979); *see also Bolling v. Schaffner*, 488 S.W.2d 212, 215 (Mo. Ct. App. 1972) (a request “lies somewhere between a peremptory demand and a polite invitation”).

238. MO. REV. STAT. § 577.041(1) (1986); *see also In re Green*, 511 S.W.2d 129, 134 (Mo. Ct. App. 1974) (not required to “recount all of the ‘factors’ or circumstances . . . which in toto gave rise to the officer’s opinion that appellant was driving while intoxicated”); *Bolling*, 488 S.W.2d at 215-16 (sufficient “reasons” given by statements that suspect was under arrest for DWI and that the test would determine the person’s blood alcohol content).

239. MO. REV. STAT. § 577.041(1) (1986); *see also Postlewait v. Missouri Dep’t of Revenue*, 643 S.W.2d 314, 316 (Mo. Ct. App. 1982) (warning is required by statute; therefore license ordered reinstated because State presented no evidence that arresting officer warned arrestee of the consequences of refusal); *Sell v. Goldberg*, 601 S.W.2d 665, 666 (Mo. Ct. App. 1980) (“warning that refusal to take the test ‘may,’ ‘might,’ or ‘could’ result in a revocation” held sufficient).

In *State v. Hanson*, 493 S.W.2d 8, 12 (Mo. Ct. App. 1973), the court stated that “[w]hether the warning . . . was given, and whether the defendant was in a rational condition, were . . . matters of fact for the trial court’s decision.” *Id.* *Hanson* appears to be the only case which mentions the mental condition of the defendant at the time of the warning.

240. MO. REV. STAT. § 577.041(1) (1986).

241. *E.g.*, *Sell*, 601 S.W.2d at 666; *Bolling*, 488 S.W.2d at 215.

242. *Collins v. Director of Revenue*, 691 S.W.2d 246, 252 (Mo. 1985) (en banc) (“Nothing in [§ 577.041(1)] requires the officer to inform the defendant of the multiplicity of consequences which might occur if the driver submits to the examination.”). One possible consequence of submitting to testing is license revocation or suspension if the test indicates a blood alcohol level of .13% or higher under §§ 302.500-.540.

243. *Spradling v. Deimeke*, 528 S.W.2d 759, 766 (Mo. 1975). The court elaborated, stating: “Whether the declination is accomplished by verbally saying, ‘I refuse,’ or by remaining silent and just not breathing or blowing into the machine, or by vocalizing some sort of qualified or conditional consent or refusal, does not make any difference. . . .” *Id.*; *see also Rains v. Director of Revenue*, 728 S.W.2d 649 (Mo. Ct. App. 1987).

blowing around the mouthpiece of the breathalyzer machine has been held to constitute a refusal.²⁴⁴ Inadvertent behavior, however, such as smoking before being warned that it might affect the test results, has been held not to be a refusal.²⁴⁵

A person can also "refuse" by inaction, or by giving a qualified or conditional consent.²⁴⁶ Nonetheless, it appears that some equivocation is permitted if it is based upon a legitimate right which the suspect has.²⁴⁷ A person should be given a reasonable amount of time to decide whether to submit to testing.²⁴⁸ In addition, a suspect has the right to consult with an attorney or other person prior to deciding whether to consent.²⁴⁹ Therefore, conditioning consent upon talking to an attorney is not a refusal so long as it will not unreasonably delay the test.²⁵⁰ This right to consult with counsel, however, does not extend to having a court appointed attorney; such a demand has been held to amount to a refusal.²⁵¹ In addition, the arrestee does not have the right to choose which test(s) to which he will submit.²⁵² If he insists on an alternative test, he will be found to have refused.²⁵³ Intentional delaying tactics may also be deemed to be a refusal.²⁵⁴

244. *Askins v. James*, 642 S.W.2d 383, 386 (Mo. Ct. App. 1981); see *Deimeke*, 528 S.W.2d at 766; see also *Stewart v. McNeill*, 703 S.W.2d 97, 99 (Mo. Ct. App. 1985) (intentional "failure to supply a sufficient breath sample" constituted a refusal).

245. *E.g.*, *Arnold v. Director of Revenue*, 593 S.W.2d 624, 626 (Mo. Ct. App. 1980) ("no proof that petitioner knew by experience, admonition or otherwise that his smoking had any effect or indeed any rational connection with the chemical test to be administered"); see also *Hester v. Spradling*, 508 S.W.2d 194 (Mo. Ct. App. 1974).

246. *E.g.*, *Deimeke*, 528 S.W.2d at 766; *Curry v. Goldberg*, 614 S.W.2d 318, 319 (Mo. Ct. App. 1981); *Walker v. Goldberg*, 588 S.W.2d 83, 85 (Mo. Ct. App. 1979). *But cf. In re Purvis*, 591 S.W.2d 29, 30 (Mo. Ct. App. 1979) ("there must be an unequivocal refusal to take the test").

247. *E.g.*, *Duncan v. Safety Responsibility Unit, Dep't of Revenue*, 550 S.W.2d 619, 622 (Mo. Ct. App. 1977).

248. In *Curry*, 614 S.W.2d at 319-20, the court determined that 19 minutes was a reasonable amount of time within which to make a decision.

249. See *supra* notes 169-75 and accompanying text.

250. *E.g.*, *Dain v. Spradling*, 534 S.W.2d 813 (Mo. Ct. App. 1976) (if police fail to honor a request to consult with an attorney, the suspect has not "refused" chemical testing); *Gooch v. Spradling*, 523 S.W.2d 861 (Mo. Ct. App. 1975) (request to speak to attorney does not constitute a refusal); see also *Hester v. Spradling*, 508 S.W.2d 194 (Mo. Ct. App. 1974); *Thomas v. Schaffner*, 448 S.W.2d 319 (Mo. Ct. App. 1969). *But cf. In re Purvis*, 591 S.W.2d at 30 (court upheld finding of refusal where arrestee conditioned his consent upon being able to confer with his attorney in room with door closed).

251. *Curry*, 614 S.W.2d at 319.

252. *Kiso v. King*, 691 S.W.2d 374 (Mo. Ct. App. 1985).

253. *Id.* at 377.

254. In *Rogers v. King*, 684 S.W.2d 390 (Mo. Ct. App. 1984), the court found that the arrestee "refused" by trying to delay the test. The arrestee requested a drink

There does not appear to be any acceptable justification for refusing to take a breathalyzer test following a lawful request by a police officer.²⁵⁵ In *Duncan v. Director of Revenue*,²⁵⁶ the suspect admitted he was intoxicated at the time of arrest and told the officer, "there was no need" to take the test. The court held that there was a "volitional declination" to take the test and upheld the one year license revocation for refusal of the chemical test.²⁵⁷ The *Duncan* court reasoned that the purpose of the revocation statute "is not . . . to allow the police to gain evidence" for later use in a criminal prosecution.²⁵⁸

Early case law held that the purpose of the revocation statute was to protect the public and "to punish those guilty of the offense of driving while intoxicated."²⁵⁹ Later cases, however, have expressly disclaimed any punitive purpose and rely instead on the goal of public safety.²⁶⁰ Unfortunately, Missouri courts have not yet explained how the public is protected by the one year revocation of a person's license for refusing chemical testing.²⁶¹ Although evidence of refusal is now admissible at trial, the refusal itself is not wrongful and should not be used to create an inference of guilt.²⁶²

of water and further asked to go to the bathroom. *See also* Walker v. Goldberg, 588 S.W.2d 83 (Mo. Ct. App. 1979) (court upheld the finding of a refusal where arrestee agreed to take the test, but stayed in his seat for 30 to 45 minutes disputing entries on the Alcohol Influence Report Form).

255. *See supra* notes 113-15, 120-26 and accompanying text.

256. 550 S.W.2d 619 (Mo. Ct. App. 1977).

257. *Id.* at 621.

258. *Id.* at 620-21 n.3. One year later, in *Mackey v. Montrym*, 443 U.S. 1 (1978), the Supreme Court expressly approved such a statutory purpose, pointing out that revocation statutes provide "strong inducement to take the breath-analysis test and thus effectuates the [state's] interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings." *Id.* at 18.

259. *Bolling v. Schaffner*, 488 S.W.2d 212, 217 (Mo. Ct. App. 1972).

260. *Tolen v. Missouri Dep't of Revenue*, 564 S.W.2d 601, 602 (Mo. Ct. App. 1978). The independent nature of the criminal and administrative proceedings made it necessary for the courts to disavow the punitive aspect of the revocation for refusal to submit to chemical testing. This enables the State to revoke a non-cooperative arrestee's license even if he is later acquitted of any criminal charges arising out of the incident.

261. The U.S. Supreme Court in *Mackey*, outlined several ways in which public safety was served by the revocation: "[A]s a deterrent to drunken driving . . . it provides a strong inducement to take the breath-analysis test . . . [and] in promptly removing such drivers from the road." 443 U.S. at 18. However, as Justice Stewart pointed out in his dissenting opinion, "The suspension penalty itself is . . . not an emergency measure to remove unsafe drivers from the roads . . . the critical fact that triggers the suspension is noncooperation with the police, not drunken driving." *Id.* at 20, (Stewart, J., dissenting).

262. MO. REV. STAT. § 577.041 (1986) permits the State to introduce evidence of refusal at trial. Persons suspected of DWI, however, still have a statutory right

B. *License Suspension/Revocation for Blood Alcohol Level Over .13 Percent*

As noted in the previous section, if a person refuses a lawful request to submit to chemical testing, his driver's license may be revoked for one year.²⁶³ If the person consents to the test, however, and if the results indicate a blood alcohol level of .13 percent or higher, he may be subject to a special suspension/revocation law outlined in sections 302.500 to .540.²⁶⁴ The police are not required to warn arrestees of this possibility.²⁶⁵ The purpose of the statute has been said to be to "expeditiously remove the most dangerous drunk drivers from Missouri roadways."²⁶⁶ A suspension/revocation [hereinafter referred to as suspension] under this statute is independent of any criminal proceedings or penalties which might arise out of the same incident.²⁶⁷

The special suspension proceedings are triggered when a person has been arrested for a DWI or BAC offense, and subsequent chemical testing shows a blood alcohol level of .13 percent or more.²⁶⁸ If the results are available

to refuse chemical testing. *Id.*

The court in *City of St. Joseph v. Johnson*, 539 S.W.2d 784 (Mo. Ct. App. 1976), wrote: "A defendant accorded a right by statute should not be required to explain the exercise of that right nor should it be used to create an inference of his guilt." *Id.* at 787. The court also pointed out that "a motorist must make his choice to refuse or submit in the atmosphere of his arrest and restraint. . . . [T]he refusal may result equally from rational causes of disquiet as from a consciousness of guilt." *Id.* (citations omitted). Although there have not yet been any cases under the new statute, it would seem that refusal evidence should be admitted for the limited purpose of explaining the absence of blood alcohol test results.

263. See *supra* notes 224-62 and accompanying text.

264. MO. REV. STAT. §§ 302.500-.540 (1986). The constitutionality of these sections has been upheld by the Missouri Supreme Court. See *Stewart v. Director of Revenue*, 702 S.W.2d 472 (Mo. 1986) (en banc) (upheld against claim that statute was impermissibly vague, and equal protection and due process challenges); *Collins v. Director of Revenue*, 691 S.W.2d 246 (Mo. 1985) (en banc) (upheld against an equal protection challenge).

265. *Collins*, 691 S.W.2d at 252 ("Nothing in [§ 577.041(1)] requires the arresting officer to inform the defendant of the multiplicity of consequences which might occur if the driver submits to the examination").

266. *Id.* In *Collins*, the court reasoned that "the proportion of people whose driving ability is impaired and the extent of that impairment rises with increasing blood-alcohol levels." *Id.* at 250; see also *Stewart v. Director of Revenue*, 702 S.W.2d 472, 475 (Mo. 1986) (en banc); *Vetter v. King*, 691 S.W.2d 255 (Mo. 1985) (en banc).

267. MO. REV. STAT. § 302.505(3) (1986) provides that "the determination . . . by the department [of revenue] is independent . . . of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect any suspension or revocation under this section."

268. MO. REV. STAT. § 302.505(1) (1986). There are two special rules regarding the charges and circumstances of arrest which should be noted. First, § 302.510(3) provides that a county or municipal violation cannot be the basis for a suspension

while the person is still in custody, the police officer will take the person's license and issue him notice of the suspension and a fifteen day temporary permit.²⁶⁹ At the same time, the licensee should receive a form which outlines his rights and responsibilities, including the right to a hearing.²⁷⁰ If the test results are not immediately available, the Department of Revenue will mail the notice to the licensee following receipt of the officer's verified report.²⁷¹

Upon receiving notice of a suspension, the person has fifteen days to request an administrative hearing. Absent a timely request for a hearing, the Department's determination is final.²⁷² A temporary driving permit will be issued pending the review.²⁷³ The hearings are conducted by licensed attorneys who are employed by the Department of Revenue,²⁷⁴ and these attorneys may constitutionally serve as both the prosecutor and hearing officer.²⁷⁵

On review of the suspension, the State has the burden of proof on two issues: (1) that the licensee was arrested upon probable cause of a DWI or BAC offense, and (2) that chemical testing showed a blood alcohol level of .13 percent or higher.²⁷⁶ The State may choose to rely upon the Department of Revenue files and the officer's verified report in order to meet its burden.²⁷⁷ This procedure has been held not to violate the licensee's rights of confron-

under this section unless the arresting officer was an elected official or was "certified" under §§ 590.100 to .150. *See Ashline v. Director of Revenue*, 707 S.W.2d 432, 433 (Mo. Ct. App. 1986) (reinstatement of license because no proof offered that arresting officer had been certified under Chapter 590). Second, under § 302.510(4), if the arrest was made at a roadblock, it cannot be used to suspend a license under this section unless there was probable cause for the arrest prior to the stop.

269. Mo. REV. STAT. § 302.520(1), (2) (1986). Although the statute is framed in mandatory language, the officer may delay delivery of the notice of suspension. *Tuggle v. Director of Revenue*, 727 S.W.2d 168 (Mo. Ct. App. 1987).

270. Mo. REV. STAT. § 302.520(2) (1986).

271. *Id.* § 302.515. Section 302.510(1) outlines what is to be included in the verified report. The police, however, are not held to strict compliance with the statutory requirements. *See, e.g., Bennett v. Director of Revenue*, 705 S.W.2d 118, 120 (Mo. Ct. App. 1986) (valid report despite absence of natural seal).

272. Mo. REV. STAT. §§ 302.505(2), .525(1), .530(1) (1986).

273. *Id.* § 302.530(2).

274. *Id.* § 302.530(3).

275. *Dove v. Director of Revenue*, 704 S.W.2d 713, 715 (Mo. Ct. App. 1986). The *Dove* court stated that administrative hearings do not need "to be conducted in all instances by an impartial arbiter. . . . It is enough to satisfy due process requirements if judicial review of the administrative decision is provided." *Id.*; *see also Bradley v. McNeill*, 709 S.W.2d 153, 155-56 (Mo. Ct. App. 1986).

276. *E.g., Stewart v. Director of Revenue*, 702 S.W.2d 472, 475 (Mo. 1986) (en banc); Mo. REV. STAT. § 302.530(4) (1986).

277. *Leach v. Director of Revenue*, 705 S.W.2d 125, 127 (Mo. Ct. App. 1986). In addition, the licensee's extrajudicial statements or admissions may be considered since it is a civil proceeding and the *corpus delicti* rule does not apply. *E.g., Tuggle v. Director of Revenue*, 727 S.W.2d 168, 169 (Mo. Ct. App. 1987); *see also supra* notes 45-62, 230-31 and accompanying text.

tation and cross examination because he has the right to subpoena and call witnesses if he decides to do so.²⁷⁸

A considerable amount of case law has developed over the issue of the probable cause necessary for the underlying arrest. A number of lower courts had read section 302.505(1) literally and interpreted the statute as requiring probable cause at the time of arrest that the person was driving with a blood alcohol level of .13 percent or higher.²⁷⁹ Such a reading, however, has been repeatedly rejected; there need only have been probable cause for a DWI or BAC arrest.²⁸⁰ The courts have stated that probable cause exists where there has been a traffic violation or unusual driving pattern which justifies the initial stopping of the motorist.²⁸¹ If the police contact was initiated as part of a roadblock, the suspension statute does not apply unless there was probable cause for the arrest prior to the stop.²⁸²

278. *Stewart*, 702 S.W.2d at 475 (citing Mo. REV. STAT. §§ 536.070(2), .077 (1986)). It might be noted that the court also cited to its decision in *Vetter v. King*, 691 S.W.2d 255 (Mo. 1985) (en banc). It is likely, however, that the court intended to refer to the companion case of *Collins v. Director of Revenue*, 691 S.W.2d 246, 254-55 (Mo. 1985) (en banc).

279. The "literal interpretation" is easily reached by a plain reading of the statute. Mo. REV. STAT. § 302.505(1) (1986) provides: "The department shall suspend or revoke the license of any person upon its determination that the person was arrested upon probable cause to believe he was driving a motor vehicle while the alcohol concentration in the person's blood or breath was [.13%] or more by weight of alcohol in his blood. . . ." It should be noted that there is no reference to a DWI or BAC standard of probable cause in the statute.

The literal interpretation was urged by Justice Rendlen in his dissenting opinions in *Collins*, 691 S.W.2d at 255, and *Vetter*, 691 S.W.2d at 258. Justice Welliver concurred with Justice Rendlen in both cases. In interpreting the statute, the dissenting Justices indicated that an officer must have probable cause to believe that a suspect was "more than mildly intoxicated at the time of arrest." *Vetter*, 691 S.W.2d at 258.

280. *E.g.*, *Stewart*, 702 S.W.2d at 475; *Collins*, 691 S.W.2d at 251-52; *Vetter*, 691 S.W.2d at 257; *see also* *Schranz v. Director of Revenue*, 703 S.W.2d 912, 912-13 (Mo. Ct. App. 1986) (sufficient probable cause where licensee found "passed out" in driver's seat, had bloodshot eyes, slurred speech); *McNeill v. Wallace*, 699 S.W.2d 534, 535 (Mo. Ct. App. 1985) (although no field sobriety tests performed, officer's observations sufficient to prove probable cause).

281. In *Isom v. Director of Revenue*, 705 S.W.2d 116 (Mo. Ct. App. 1986), the licensee disputed the officer's assertion that he had been speeding. The court stated that if the licensee was not speeding, "there was no probable cause to stop him and the conditions requisite to a license suspension under §§ 302.500-.540 . . . were not satisfied. . . ." *Id.* at 117. The court also stated that "[p]roof after the fact that the subject exhibited conditions associated with intoxication is not enough." *Id.*; *see also* *Dalton v. McNeill*, 713 S.W.2d 26, 29 (Mo. Ct. App. 1986) (Dalton found "passed out" in car in fast food drive-thru lane; held sufficient probable cause to "stop" the suspect); *Schranz*, 703 S.W.2d at 912-13 (petitioner hit a building and was found "passed out" behind wheel; held sufficient probable cause).

282. Mo. REV. STAT. § 302.510(4) (1986). Of course, the licensee may still be prosecuted on the criminal charges for DWI or BAC.

The State also has the burden of proving that chemical analysis revealed that the licensee had a blood alcohol level of .13 percent or higher.²⁸³ In order for the test results to be considered valid, evidence must be presented that the test was administered by a qualified person in accordance with division of health procedures.²⁸⁴ The licensee is of course free to challenge the test results and may present evidence of a deviation from the required procedures or of a malfunction of the equipment.²⁸⁵

Following an adverse decision at the administrative level, the licensee has fifteen days to petition for a trial *de novo* in the circuit court.²⁸⁶ The procedure is exclusive and may not be circumvented by an action for injunctive relief against enforcement of the suspension.²⁸⁷ It should be also noted that the license suspension is not stayed by the filing of the suit.²⁸⁸ However, if the licensee has no "alcohol related enforcement contacts"²⁸⁹

283. *E.g.*, *Stewart*, 702 S.W.2d at 475.

284. *Jannett v. King*, 687 S.W.2d 252, 253-54 (Mo. Ct. App. 1984). In *Jannett*, the court stated that the testing methods and conditions must comply with the legislative standard for admissibility of test result evidence found at MO. REV. STAT. §§ 577.020, .026 (1986). These statutes "have equal applicability whether the proceeding is criminal or civil. . . ." *Id.* at 254; see *Burr v. Director of Revenue*, 707 S.W.2d 430, 431-32 (Mo. Ct. App. 1986) (reinstatement of license because the State failed to present evidence that officer was certified to administer test, and no evidence as to what procedures were followed); *Felber v. Director of Revenue*, 720 S.W.2d 452 (Mo. Ct. App. 1986) (breathalyzer results held inadmissible because no evidence as to what machine was used). *But see Elkins v. Director of Revenue*, 728 S.W.2d 567 (Mo. Ct. App. 1987) (possession of valid permit is not necessary if the officer testifies that he is "qualified").

285. See *Jannett*, 687 S.W.2d at 254 (absent evidence of malfunction, the State is not required to "establish that the instrument is free from defects"). For a discussion of challenging breathalyzer results, see *supra* notes 152-68 and accompanying text.

286. MO. REV. STAT. §§ 302.530(6), .535(1) (1986); see *Dove v. Director of Revenue*, 704 S.W.2d 713, 715 (Mo. Ct. App. 1986) (the proceeding is not a review or appeal of the administrative decision); *McNeill v. Gardner*, 715 S.W.2d 928 (Mo. Ct. App. 1986) (burden is again on the State to make a prima facie case).

MO. REV. STAT. § 302.535(1) (1986) also states: "The case shall be decided by the judge sitting without a jury." The constitutionality of this provision was upheld in *Simpson v. Director of Revenue*, 710 S.W.2d 25, 26 (Mo. Ct. App. 1986).

287. *Bradley v. McNeill*, 709 S.W.2d 153, 156 (Mo. Ct. App. 1986) (the statutory scheme provides an adequate legal remedy).

288. MO. REV. STAT. § 302.535(2) (1986); see *State ex rel. King v. Kinder*, 690 S.W.2d 408, 409 (Mo. 1985) (en banc) (circuit court is without authority to stay the suspension).

289. "Alcohol related enforcement contacts" is defined in § 302.525(3) as "any suspension or revocation under sections 302.500 to 302.540, any suspension or revocation entered in this or any other state for a refusal to submit to chemical testing under an implied consent law, and any conviction . . . for a violation which involves driving a vehicle while having an unlawful alcohol concentration." MO. REV. STAT.

within the previous five years, he will be issued a restricted driving permit.²⁹⁰

The length of the suspension period depends upon the licensee's driving record. If there have been no "alcohol related enforcement contacts"²⁹¹ within the preceding five years, the person will be subject to a thirty day suspension, followed by sixty days of restricted driving privileges.²⁹² The person's license will be revoked for one year, however, if there have been any alcohol related suspensions or convictions within the prior five years.²⁹³

The Missouri legislature anticipated the possibility that multiple license suspensions could result from a single arrest. Section 302.525(4) deals with this problem and provides that in such a situation, the suspension under section 302.500 *et seq* may be "credited" against any other suspension imposed; the total period of suspension will be equal to the longer of the two penalties.²⁹⁴ Prior to reinstatement of his driving privileges, the licensee will be required to complete an alcohol or drug related traffic offender program [ARTOP].²⁹⁵

C. License Suspension/Revocation for Points Following Conviction

1. First Offenses—License Suspension.

Upon conviction for any moving traffic violation, the Director of Revenue will assess "points" against the person's driver's license.²⁹⁶ A first offense DWI will result in eight points against the licensee.²⁹⁷ In general, an

§ 302.525(3) (1986).

Note that under the latter part of the definition, it could be argued that some DWI convictions would not be included because proof of a specific blood alcohol level is not required for conviction. For example, section 577.010, the DWI statute, refers only to an "intoxicated" condition. *Id.* § 577.010.

290. *Id.* § 302.535(2). Restricted driving permits may only be used to drive "in connection with the petitioner's business, occupation, employment, or formal program of secondary, postsecondary or higher education." *Id.* If the licensee has had prior alcohol related enforcement contacts within the preceding five years, the department has discretion in issuing the restricted permit. *Id.*

291. *See supra* note 289.

292. MO. REV. STAT. § 302.525(2)(1) (1986). Prior to issuance of the restricted permit, the licensee is required to file proof of financial responsibility in accordance with Chapter 303. *Id.*

293. *Id.* § 302.525(2)(2).

294. *Id.* § 302.525(4).

295. *Id.* § 302.540(1).

296. *Id.* § 302.302.

297. *Id.* § 302.302(1)(7). This subsection also applies to a first conviction for driving under the influence of controlled substances or drugs.

accumulation of eight points within an eighteen month period will result in a thirty day suspension of driving privileges.²⁹⁸ With intoxication related offenses, however, an additional sixty day period of restricted driving privileges will be imposed.²⁹⁹ A BAC conviction will lead to the assessment of six points against the person's license.³⁰⁰ If the licensee has other points against him which cause the total number to exceed eight, he will be subject to the special intoxication related suspension period.³⁰¹ It might also be noted that if the traffic violation resulted in any personal injury or property damage, an additional two points will be assessed against the person's driver's license.³⁰²

The propriety of a suspension can be appealed to the circuit court for a *de novo* hearing.³⁰³ The Director of Revenue is a necessary party to such proceedings and must be specifically included in the title of the petition.³⁰⁴ The licensee must file his petition within thirty days of receiving notice of the suspension; after such time, the court no longer has jurisdiction to hear the case.³⁰⁵

Upon completion of the suspension period, the person's driver's license will be reinstated.³⁰⁶ Prior to this, however, the licensee will be required to file proof of financial responsibility pursuant to Chapter 303³⁰⁷ of Missouri's statutes. This "proof" must be maintained for two years, or the person's license will be re-suspended.³⁰⁸

298. *Id.* § 302.304(2), (3)(1).

299. *Id.* § 302.304(4). With the restricted driving permit, the licensee may only drive "between a residence and a place of employment, or to and from an alcohol education or treatment program" or both. *Id.*

300. *Id.* § 302.302(1)(9) (six points will be assessed regardless of whether the BAC was a state law or county or municipal ordinance violation).

301. *Id.* § 302.304(4); *see supra* note 299 and accompanying text.

302. MO. REV. STAT. § 302.302(2) (1986).

303. *Id.* § 302.311.

304. *Laiben v. State*, 684 S.W.2d 943, 944 (Mo. Ct. App. 1985). The court pointed out that "[i]t is the director in his official capacity and not the Department of Revenue who is a necessary party to these proceedings." *Id.* at 945. Because the Director was not joined, the trial court did not have jurisdiction and the appeal was dismissed. *Id.*; *see also In re Mulderig*, 670 S.W.2d 182, 183 (Mo. Ct. App. 1984) ("failure of the petitioner to make the Director a party to the action was a jurisdictional defect requiring reversal").

305. MO. REV. STAT. § 302.311 (1986); *see also In re Mulderig*, 670 S.W.2d at 183 ("If the petition is not filed within 30 days, the circuit court has no subject matter jurisdiction and any relief granted to the petitioner is void.").

306. MO. REV. STAT. §§ 302.304(4), .309(1) (1986). Reinstatement is appropriate because suspension involves only the "temporary withdrawal" of driving privileges. *Id.* § 302.500(7). Revocations involve "termination" of privileges, and the person must re-apply for a new license. *Id.* § 302.500(5).

307. *Id.* §§ 302.304(4), .309(1).

308. *Id.* §§ 302.303, .304(5).

2. Repeat Offenders—License Revocation.

A second or subsequent DWI or BAC conviction, or any combination of these convictions, will result in twelve points being assessed against the offender's license.³⁰⁹ A person who has accumulated twelve points within a twelve month period will have his license revoked for one year.³¹⁰ If such person fails to file proof of financial responsibility in accordance with Chapter 303, the revocation period will be extended to two years.³¹¹ Because "revocation" involves the termination of driving privileges,³¹² the person will be required to re-take his driving test and apply for a new license.³¹³

The revocation statute³¹⁴ does not provide for any special revocation period for intoxication related traffic offenders.³¹⁵ The one year revocation period applies to anyone who has accumulated twelve points against his license.³¹⁶ Section 302.060, however, has two subsections which restrict the eligibility of repeat DWI offenders to obtain a new license.

Section 302.060(10) applies to persons with two DWI convictions. The Missouri legislature recently revised this section, which now provides that:

[t]he director shall not issue any license hereunder: [t]o any person who has been convicted twice within a five year period of violating the laws of this state relating to driving while intoxicated. . . . The director shall not issue a license to such person for five years from the date such person was convicted . . . for driving while intoxicated for the second time.³¹⁷

The new version of section 302.060(10) is unambiguous and should clear up some of the confusion which had resulted under the old statute.³¹⁸

309. *Id.* § 302.302(1).

310. *Id.* § 302.304(6). This revocation also applies to persons who have accumulated 18 points in 24 months, or 24 points in 36 months. *Id.*

311. *Id.*

312. *Id.* § 302.500(5); *see supra* note 306.

313. *Id.* § 302.304(6) (1986).

314. *Id.* § 302.304.

315. As noted previously, this section does provide for a special *suspension* period for such offenders. *See supra* notes 296-308 and accompanying text.

316. Mo. REV. STAT. § 302.304(6) (1986).

317. *Id.* § 302.060(10). It should be noted that this section does not apply to BAC convictions.

318. The previous version of § 302.060(10) provided that "[t]he director shall not issue any license hereunder: [t]o any person whose application shows that he was, within five years prior to such application, convicted for the second time of violating the laws of this state relating to driving while intoxicated. . . ." Mo. REV. STAT. § 302.060(10) (1978). In *Breeze v. Goldberg*, 595 S.W.2d 381 (Mo. Ct. App. 1980), the court held that the five year ineligibility period was not applicable unless the "two convictions for [DWI] . . . occurred within the five year period prior to such application." *Id.* at 383. The two DWI convictions in *Breeze* had occurred more than five years apart; therefore, the Director was ordered to reinstate the applicant's license

Third or subsequent DWI offenders will be subject to section 302.060(9).³¹⁹ Under this statute, the person will be ineligible to apply for a driver's license for ten years from the date of his last conviction.³²⁰ At the end of such time, he may petition the circuit court for a review of his conduct since his last conviction. The court may order that the person be permitted to apply for a license upon a finding that: (1) "the petitioner has not been convicted of any offense related to alcohol, controlled substances or drugs . . . and [(2)] that his habits and conduct show him to no longer pose a threat to the public safety of this state."³²¹

The progressive suspension-revocation scheme may be summarized as follows:

1. First offense DWI—Thirty day suspension, followed by sixty days of restricted driving privileges.³²²
2. Second offense DWI—
 - (a) more than five years after first conviction—One year revocation of driver's license.³²³
 - (b) within five years of the first conviction— Ineligible to apply for license for five years from date of second conviction.³²⁴

since the one year revocation for points under § 302.304(6) had expired.

In the unpublished decision of *Burks v. King*, No. 36238 (Mo. Ct. App. 1985), the court determined that the five year ineligibility period should be measured from the date of the first conviction. Thereafter, the two convictions would not be within five years of the license application. The Missouri Supreme Court disagreed with this approach. See *Burks v. King*, 698 S.W.2d 324 (Mo. 1985) (en banc).

In *Messer v. King*, 698 S.W.2d 324 (Mo. 1985) (en banc), the Missouri Supreme Court stated that it did "not agree with [the *Breeze*] opinion." *Id.* at 325. Noting that the "statutory language is crystal clear," the court held that the petitioner "was convicted of driving while intoxicated within five years of the application [for a new license]. The conviction . . . was a second conviction. By the plain language of the statute, [he] was ineligible to apply." *Id.*

Although the court appeared to have stated a rule for all second DWI offenders, the result in *Messer* could still be harmonized with *Breeze* and with the new version of Mo. REV. STAT. § 302.060(10). The petitioner in *Messer* had 2 DWI convictions within five years from the date of the second conviction; accordingly, he should not have been eligible for a driver's license for five years from the date of his second conviction. The two convictions of the petitioner in *Breeze* occurred more than five years apart; therefore the petitioner could reapply for a driver's license one year after the second conviction.

It should be noted that the revised § 302.060(10) provides that it is to be applied retroactively to persons who had been denied licenses under the previous version. Mo. REV. STAT. § 302.060(10) (1986).

319. Mo. REV. STAT. § 302.060(9) (1986).

320. *Id.*

321. *Id.*

322. *Id.* § 302.304(4); see *supra* notes 296-308 and accompanying text.

323. Mo. REV. STAT. § 302.304(6) (1986) (revocation for 12 points assessed following second DWI conviction); see *supra* notes 309-18 and accompanying text.

324. Mo. REV. STAT. § 302.060(10) (1986).

3. Third offense DWI—Ineligible to apply for driver's license for ten years from date of last conviction.³²⁵

It should also be noted that administrative revocations cannot be challenged on the basis of the Director's use of uncounselled convictions.³²⁶ In criminal trials, uncounselled misdemeanor convictions may not be used to enhance punishment where imprisonment will be imposed.³²⁷ This principle is not applicable to administrative proceedings however, because they are civil in nature, and the loss of driving privileges is not considered a criminal penalty.³²⁸ Therefore, the Director may properly use prior uncounselled convictions to enhance administrative penalties.

D. *Limited Hardship Licenses.*

A person whose license has been suspended or revoked may apply to the circuit court for hardship driving privileges.³²⁹ The applicant must show that he is "required to operate a motor vehicle in connection with his business, occupation or employment . . . [and that] undue hardship . . . in earning a livelihood" would otherwise occur.³³⁰ The application must include a certified copy of the person's driving record for the prior five years and proof of financial responsibility under Chapter 303.³³¹ The privilege will be terminated if the person commits any traffic violation which results in points being assessed under section 302.302.³³²

Two classes of intoxication-related offenders are excluded from eligibility under the hardship license statute. First, the license is not available to a person who has had his license revoked more than once in the preceding five years for refusing to submit to chemical testing.³³³ The second restricted category has been recently clarified by the legislature. Under section 302.309(3)(5)(a), a hardship license will not be issued to any person "who has been convicted . . . twice within a five-year period of violating the pro-

325. *Id.* § 302.060(9).

326. *Buehler v. Director of Revenue*, 716 S.W.2d 310 (Mo. Ct. App. 1986); *White v. King*, 700 S.W.2d 152 (Mo. Ct. App. 1985).

327. *White*, 700 S.W.2d at 155 (citing *Baldasar v. Illinois*, 446 U.S. 222 (1980)); see *supra* notes 176-89.

328. See *Buehler*, 716 S.W.2d at 311 (*Baldasar* "does not prevent the use of such earlier uncounselled convictions to increase civil penalties or sanctions, which do not involve incarceration"); *White*, 700 S.W.2d at 155 (citing *Tolen v. Missouri Dep't of Revenue*, 564 S.W.2d 601, 602 (Mo. Ct. App. 1978).

329. MO. REV. STAT. § 302.309 (1986).

330. *Id.* § 302.309(3)(2).

331. *Id.* § 302.309(3)(3).

332. *Id.* § 302.309(3)(4).

333. *Id.* § 302.309(3)(5)(d). Refusing to submit to chemical testing of blood alcohol level will result in a one year revocation under § 577.041(1). See *supra* notes 224-62 and accompanying text.

visions of section 577.010, RSMo. The director shall not issue a license to such person for five years from the date such person was convicted for violating the provisions of section 577.010, RSMo.”³³⁴ The revised version of this statute clearly indicates the legislature’s intent and should clear up some of the confusion which had resulted under the old statute.³³⁵

IV. CONCLUSION

This Comment has attempted to provide an overview of current Missouri law on the topic of intoxication-related driving offenses. This is a continuously changing area of the law, however, and a “current perspective” is difficult to maintain. Accordingly, practitioners are cautioned to watch for new developments on pertinent issues.

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334. MO. REV. STAT. § 302.309(3)(5)(a) (1986).

335. The prior version of MO. REV. STAT. § 302.309(3)(5)(a) provided that a hardship license would not be issued to a person “[w]ho has been convicted . . . twice within a five-year period of violating the provisions of section 577.010, RSMo.” MO. REV. STAT. § 302.309(3)(5)(a) (1978). Problems in interpreting the statute resulted because there was no reference to any time limitations regarding when the two DWI convictions occurred or when, if ever, such a person could apply for a hardship license. The new statute answers these questions. *See supra* note 334 and accompanying text.

In *Williams v. Schaffner*, 477 S.W.2d 55 (Mo. 1972) (en banc), the statute was held to flatly prohibit the granting of a hardship license to an applicant with two DWI convictions. In *Smith v. State*, 677 S.W.2d 920 (Mo. Ct. App. 1984), the court relied upon *Breeze v. Goldberg*, 595 S.W.2d 381 (Mo. Ct. App. 1980) and held that the “two prior convictions must have occurred within a five year period prior to the application for limited driving privileges before denial can occur.” *Smith*, 677 S.W.2d at 923. As previously noted, the Missouri Supreme Court in *Messer v. King*, 698 S.W.2d 324 (Mo. 1985) (en banc), stated that it disagreed with the *Breeze* decision. The *Messer* court noted that *Smith* followed the reasoning in *Breeze*, but made no further comment on the merits of *Smith*. *See supra* note 318.

The new version of § 302.309(3)(5)(a) provides that it is to be applied retroactively to persons previously denied a hardship license. MO. REV. STAT. § 302.309(3)(5)(a) (1986). It might also be noted that for persons with two DWI convictions within five years, the amount of time such person is ineligible for both hardship privileges and a “regular” driver’s license is five years from the date of the second conviction. *See* MO. REV. STAT. §§ 302.060(10), .309(3)(5)(a) (1986).

